TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 75

WEYERHAEUSER STEAMSHIP COMPANY,
PETITIONER,

vs.

NACIREMA OPERATING CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 2, 1957
CERTIORARI GRANTED MARCH 11, 1957

SUPREME COURT OF THE UNITED STATES

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APPENDIX TO BRIEF FOR DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT

[fol. 1]

F6 5-21-54
F6 (6-54)
F-5
Civ. 76-282

WILLIAM CONNOLLY

v.

WEYERHAEUSER STEAMSHIP COMPANY,
Deft. and 3rd Party Pltf.,

v.

NACIREMA OPERATING COMPANY, INC. and TURNER AND BLANCHARD, INC., 3rd Party.

Attorneys
for pltf., Nathan Greenberg, 50 Broad Street.

for deft., Dow & Symmers, 70 Pine Street.
Galli & Locker, 80 John St. (38).
(9-30-54)

COPY OF DOCKET ENTRIES

Basis of Action: Seaman—Personal Injury—Jones Act

Jury Trial Claimed by plaintiff 6-17-52

Date	Acct.	Received
6/1 /54	NG	15-
6/18/54	D & S	5-

Date	Action	
June 17-52	Filed complaint and issued summons	15
June 20-52	Filed Summons and Return—Served Mr. Caulfield claims agent for deft. 6-18-52	(2.30) Pd.
Dec. 8-52	Filed answer of deft. Weyerhaeuser	D & S

Date	Action	
Dec. 10-52	Filed notice of taking exam. of pltf. before trial	
Jan. 30-53	Filed Note of Issue for trial	
June 12-53	Filed Notice of Motion for 3rd party complaint Ret. 6-16-53	D & S
July 14-53	Memo End. on motion filed 6-12-53—granted Weinfeld, J.	
July 15-53	Filed affdvt. of Nathan Greenberg	
July 20-53	Filed 3rd party complaint and issued 3rd party summons	D & S
[fol. 2]		
July 24-53	Filed summons and return—Served Turner and Blanchard on 7-21-53; Served Nacirema. Operating on 7-21-53	Marshall Paid
Sept. 21-53	Filed pltfs. interrogs. propounded to defendant	pltf.
Sept. 30-53	Filed answer to 3rd party complaint of 3rd party pltf. Weyerhaeuser SS Co. and complaint of pltf. William Connolly	G & L
Nov. 27-53	Filed answer of defendant Weyerhaeuser SS to interrog. of 3rd party defts.	deft.
Dec. 2-53	Filed interrog.	G & L
Dec. 3-53	Filed Notice of Motion for preference—Denied, etc. (see memo) Knox, Ch. J.	
Dec. 3-53	Filed Affdvt. in opp. to preference	
Feb. 15-54	Filed Notice of Motion for Preference—Set this case at head of calendar for trial on 4-5-54, Knox, Ch. J.	
Feb. 18-54	Filed answer to interrog.	D & S
Mar. 8-54	Filed Notice of Taking testimony of Dr. Michelson	
Mar. 8-54	Filed Notice of Taking testimony of Dr. Riseman	

Date	Action
Mar. 22-54	Filed Notice of Taking Deposition of Sister Virginia
Mar. 30-54	Filed Notice of Motion to assign Trial—Set this case at head of calendar for actual trial on 5-17-54, peremptorily, Knox, Ch. J.
Mar. 30-54	Filed Affdvt. of Nathan Greenberg
May 17-54	Before McGohey J.—Trial begun
May 18-54	Before McGohey J.—Trial continued
[fol. 3]	
May 19-54	Before McGohey J.—Trial continued Parties stipulated to discontinue as to Turner and Blanchard, Inc.
May 20-54	Before McGohey J. Trial Continued. Verdict $50,000.—for pltf. on 1st cause (negligence). For deft. on 2nd cause (seaworthiness). As to the third party action, Court orders verdict for 3rd party deft. Nacirema Operating Co. Motions to be made in 10 days
May 21-54	Filed judgment that pltf. have judgment against deft. for $50,000.00 on first cause, (Clerk). Mailed Notice of Entry 5-24-54
June 1-54	Filed Bill of Costs taxed at $346.35
June 1-54	Judgment filed 5-21-54 d o c k e t e d as #59,263
June 3-54	Filed Bill of Costs taxed at $20
May 28-54	Filed Notice of Motion to set aside verdict in favor of 3rd party deft. memo endorsed. Motion denied, so ordered, McGohey, J., 6-7-54. Mailed notice of entry 6-8-54
May 28-54	Filed notice of motion to set aside verdict in favor of pltf. memo endorsed. Motion denied, so ordered, McGohey; J. Mailed Notice of entry 6-8-54

Date	Action	
June 18-54	Filed Notice of Appeal and on 6-21-54 mailed copy to Galli and Locker	D & S
June 18-54	Filed Cost Bond on Appeal—National Surety Corp.	
June 30-54	Filed Satisfaction of Judgment #59,263	
July 28-54	Filed Motion and Order extending time to file appeal record 9-8-54, Bicks, J. Mailed Notice of Entry 7-29-54	D & S

[fol. 5]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM CONNOLLY, Plaintiff,

v.

WEYERHAEUSER STEAMSHIP COMPANY, Defendant.

Plaintiff Demands a Trial by Jury.

COMPLAINT—Filed June 17, 1952

Action by seaman under special rules for seaman to sue without prepayment of costs or fees for enforcement of laws of the United States, protection of health and safety at sea.

The plaintiff, complaining of the defendant, alleges upon information and belief:

For a First Cause of Action

First: That at all the times hereinafter mentioned, the defendant, Weyerhaeuser Steamship Company, was and now is a corporation organized and existing under and by virtue of the Laws of the State of Delaware, and at all the said times was and is doing business in the State of New York with an office for the regular transaction of business within the jurisdiction of this Court.

Second: That at all the times hereinafter mentioned, the defendant owned, operated, managed and controlled the vessel F. E. WEYERHAEUSER.

[fol. 6] Third: That at all the times hereinafter mentioned, the vessel F. E. WEYERHAEUSER lay at the port of Boston, within the territorial waters of the Commonwealth of Massachusetts and the United States of America.

Fourth: That at all the times hereinafter mentioned, the plaintiff was and still is a resident of Boston, Commonwealth of Massachusetts.

Fifth: That at all the times hereinafter mentioned, the defendant, acting through its agents, representatives, servants, and employees, contracted with the Nacirema Operating Co., Inc., whereby the said Nacirema Operating Co., Inc. was to perform stevedoring services aboard the vessel F. E. WEYERHAEUSER.

Sixth: That at all the times hereinafter mentioned and more particularly at the time the plaintiff was injured as hereinafter alleged, the Nacirema Operating Co., Inc., by its agents, servants and employees, of whom the plaintiff was one, was lawfully and properly aboard the vessel F. E. WEYERHAEUSER performing the services of a stevedore.

Seventh: That at all the times hereinafter mentioned and more particularly at the time the plaintiff was injured as hereinafter alleged, plaintiff was in the employ of the Nacirema Operating Co., Inc. in the capacity of a longshoreman and the plaintiff was working as a longshoreman aboard the vessel F. E. WEYERHAEUSER.

Eighth: That on or about February 4th, 1952, while the plaintiff was working on the bottom of #1 hold, he was caused to sustain severe and crippling injuries when a piece of lumber fell from a makeshift shelter on the main deck, striking plaintiff on the head.

[fol. 7] Ninth: That the said accident occurred without any fault on the part of the plaintiff and wholly and solely through the negligence and carelessness of the defendant, its agents, servants and employees in failing and neglecting

to provide the plaintiff with a safe place in which to work aboard the vessel F. E. WEYERHAEUSER, and in failing and neglecting to provide him with a seaworthy and proper vessel, appliances and equipment; and that the defendant, its agents, servants and employees was further negligent in permitting a piece of lumber to fall and strike the plaintiff.

Tenth: That by reason of the said accident, plaintiff suffered very serious and permanent personal injuries, has been disabled and expects to be disabled for a long period of time to come, has suffered and will suffer physical pain and mental anguish, has been and will be prevented from attending to his work, has lost and will lose large sums of money which he otherwise would have earned, has been obliged to undergo medical and hospital care and attention and is still undergoing the same, has become indebted and will become indebted in a substantial sum for medical and hospital care and attention and has been permanently injured, all to his damage in the sum of $100,000.00.

Eleventh: That the plaintiff is a citizen of the Commonwealth of Massachusetts and that the defendant is a citizen of the State of Delaware; that there is diversity of citizenship of the parties and the amount in controversy is in excess of $3,000.00.

For a Second Cause of Action

Twelfth: Plaintiff repeats and realleges all of the foregoing paragraphs of the complaint with the same force [fol. 8] and effect as if herein set forth at length, and in addition thereto, alleges:

Thirteenth: That the injuries to the plaintiff were caused by reason of the failure of the defendant to provide and maintain a seaworthy vessel and/or proper and suitable appliances and equipment. This claim of the plaintiff is known as unseaworthiness under maritime law.

Fourteenth: As a result of the foregoing, plaintiff sustained permanent and crippling injuries, suffered pain and mental anguish, incurred medical expenses, lost a long time from his usual work, and will continue to suffer pain and

mental anguish, incur medical expenses and lose time from his usual work, all to his damage in the sum of $100,000.00.

Wherefore, plaintiff demands judgment against the defendant in the sum of $100,000.00, together with the costs and disbursements of this action.

/s/ Nathan Greenberg, Attorney for Plaintiff, Office and P. O. Address, Fifty Broad Street, Borough of Manhattan, City of New York.

[fol. 9] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER—Filed December 8, 1952

Defendant, Weyerhaeuser Steamship Company, by its attorneys Dow & Symmers, for its answer in the complaint, alleges upon information and belief as follows:

As to the First Cause of Action

First: Defendant admits Paragraphs First and Second of the complaint.

Second: Defendant denies any knowledge or information sufficient to form a belief as to Paragraphs Third, Fourth, Fifth, Seventh and Eleventh of the complaint.

Third: Defendant denies Paragraphs Sixth, Eighth, Ninth and Tenth of the complaint.

As to the Second Cause of Action

Fourth: Defendant repeats and realleges the admissions and denials contained in Paragraphs First through Eleventh, inclusive, of this answer, with the same force and effect as set forth at length herein.

[fol. 10] Fifth: Defendant denies Paragraphs Twelfth, Thirteenth and Fourteenth of the complaint.

First Defense

Sixth: If plaintiff sustained any accident or injuries as alleged in the complaint, which is denied, such accident and injuries were not caused, aggravated or contributed to by any carelessness or negligence on the part of the defendant or any of its agents, servants or employees, but were caused by or contributed to by the carelessness or negligence of the plaintiff, or were due to the plaintiff's willful misconduct or to the fault or negligence of others, or to other conditions for which defendant is not responsible.

Second Defense

Seventh: At the time plaintiff sustained the accident and injuries as alleged in the complaint, if such accident and injuries were in fact sustained, the SS F. E. WEYERHAEUSER was undergoing certain work that was being performed by Nacirema Operating Company, Inc. in accordance with the terms and conditions of a contract between the defendant and Nacirema Operating Company, wherein Nacirema Operating Company agreed to furnish stevedoring services for and in the performance of the work as provided in the said contract, for and in consideration of a sum to be paid by defendant to Nacirema Operating Company.

Eighth: At the time plaintiff sustained the accident and injuries as alleged in the complaint, if such accident and injuries were in fact sustained, defendant had no supervision, direction, operation or control over the work being [fol. 11] done by Nacirema Operating Company or supervision, direction, possession or control over that part of the vessel where the work was being performed or where plaintiff sustained his alleged accident and injuries. There was no unusual danger inherent in the nature of the work that was being done by Nacirema Operating Company; that if plaintiff sustained any accident or injuries as alleged in the complaint through the negligence of any person other than plaintiff himself, it was the negligence of Nacirema Operating Company, their agents, servants and employees for whose acts or omissions defendant is not responsible and did not result from any negligence on the part of the defendant.

Third Defense

Ninth: Plaintiff's status aboard the SS F. E. WEYERHAEUSER as a business invitee, guest or otherwise, and the work in which he was allegedly engaged in at the time of the happening of the alleged accident, as set forth in the complaint, had certain hazards and inherent risks incident thereto which were obvious and well known to the plaintiff, and plaintiff had full knowledge of the methods to be used in performance of such work and the dangers thereof upon boarding the vessel for entrance upon said work and thereafter until the time of his alleged accident; that whatever dangers and injuries were sustained by plaintiff as alleged in the complaint, arose from and were caused by such risks arising out of his status and employment and such risks were accepted and assumed by plaintiff upon boarding the vessel and upon entering into and continuing the performance of work thereon.

[fol. 12] Fourth Defense

Tenth: Any accident or injuries which plaintiff may have sustained as alleged in the complaint herein were not caused by any negligence or want of care on the part of defendant, its servants, agents or employees, but were caused solely by or contributed to by the negligence or carelessness of competent fellow servants of plaintiff in the employ of Naeirema Operating Company, plaintiff's employer.

WHEREFORE defendant prays that the complaint herein be dismissed with costs and that it may have such other and further relief as may be just and proper.

Dow & Symmers, By: Frederick Fish, A Member of the Firm, Attorneys for Defendant, Office and P. O. Address, 70 Pine Street, Borough of Manhattan, City of New York.

[fol. 13] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No. 76-282

WILLIAM CONNOLLY, Plaintiff,

v.

WEYERHAEUSER STEAMSHIP COMPANY, Defendant and Third-Party Plaintiff,

and

NACIREMA OPERATING CO., INC., and TURNER AND BLANCHARD, INC., Third-Party Defendants.

THIRD-PARTY COMPLAINT—Filed July 20, 1953

Defendant Weyerhaeuser Steamship Company, as third-party plaintiff, for its complaint against Nacirema Operating Co., Inc. and Turner and Blanchard, Inc., third-party defendants, respectfully alleges upon information and belief as follows:

First: Third-Party plaintiff Weyerhaeuser Steamship Company is a foreign corporation duly organized and existing under the laws of the State of Delaware.

Second: During all the times hereinafter mentioned third-party defendant Nacirema Operating Co., Inc. was and still is a corporation organized and existing under the Laws of the State of New York, having an office and principal place of business at 21 State Street, City, County and State of New York.

[fol. 14] Third: During all the time hereinafter mentioned third-party defendant Turner & Blanchard, Inc. was and still is a corporation organized and existing under the laws of the State of New York, having an office and principal place of business at 21 State Street, City, County and State of New York.

Fourth: On or about June 17, 1952, plaintiff William Connolly brought an action against Weyerhaeuser Steam-

ship Company in which damages in the amount of $100,000 were sought for injuries allegedly sustained on February 4, 1952, by plaintiff while employed by Nacirema Operating Company as a longshoreman, Castle Island, South Boston. The complaint alleges that while so employed, plaintiff was caused to sustain severe and crippling injuries when a piece of lumber fell from a makeshift shelter on the main deck, striking plaintiff on the head. Plaintiff further alleges that he was caused to sustain severe injuries as a result of the negligence of third-party plaintiff. Copies of the said complaint and of the answer of Weyerhaeuser Steamship Company thereto are attached hereto as Exhibits "A" and "B".

Fifth: At all times mentioned in the complaint the alleged injuries to plaintiff were not due to any fault or negligence on the part of third-party plaintiff Weyerhaeuser Steamship Company, its servants, agents or employees or to the unseaworthiness of the SS F. E. WEYERHAEUSER.

Sixth: At the time of the alleged injuries to plaintiff, third-party defendant Nacirema Operating Company, Inc. pursuant to a contract with third-party plaintiff Weyerhaeuser Steamship Company, was engaged in cargo operations aboard the SS F. E. WEYERHAEUSER and on Castle Island, South Boston. Third-party defendant Turner & [fol. 15] Blanchard, Inc. was the subcontractor, agent, servant or employee of third-party defendant Nacirema Operating Co., Inc. engaged in cargo operations aboard the SS F. E. WEYERHAEUSER and on Castle Island, South Boston.

Seventh: At the time of the alleged injuries to plaintiff, plaintiff was an employee of third-party defendant Nacirema Operating Co., Inc. and was under the direction, supervision and control of third-party defendant Nacirema Operating Co., Inc., or was on loan or hire from third-party defendant Turner & Blanchard, Inc. or else plaintiff was an employee of third-party defendant Turner & Blanchard, Inc. and was under the direction, supervision and control of either third-party defendant Nacirema Operating Co., Inc. or third-party defendant Turner & Blanchard, Inc.

Eighth: At the time of the alleged injuries to plaintiff, third-party defendants Nacirema Operating Co., Inc. and Turner & Blanchard, Inc. had the direction, supervision and control of that part of the SS F. E. WEYERHAEUSER and Castle Island where plaintiff was engaged in and about his work and allegedly injured.

Ninth: At the time of the alleged injuries to plaintiff, third-party defendants Nacirema Operating Co., Inc. and Turner & Blanchard, Inc. were under a contractual obligation to third-party plaintiff Weyerhaeuser Steamship Company to provide adequate and proper stevedoring equipment and personnel; to inspect the vessel and Castle Island, South Boston, and the working areas of plaintiff and his co-workers; to properly warn the longshoremen and other stevedoring personnel, including plaintiff, as to the dangers to be encountered during stevedoring and cargo operations; [fol. 16] to furnish their employees a safe place to work; to provide competent co-employees, agents, servants and subcontractors; and to indemnify third-party plaintiff Weyerhaeuser Steamship Company for any loss sustained by it arising from the acts or omissions of third-party defendants Nacirema Operating Co., Inc. and Turner & Blanchard, Inc.

Tenth: If the injuries of plaintiff were due to the negligence of any persons other than plaintiff himself, they were due to the negligence and breach of contract of third-party defendants Nacirema Operating Co., Inc. and Turner & Blanchard, Inc., their respective servants, agents or employees, in that third-party defendants Nacirema Operating Co., Inc. and Turner & Blanchard, Inc. failed to provide adequate and proper stevedoring equipment and personnel; to inspect the vessel at Castle Island and working area of plaintiff and the place of the alleged injuries; to properly warn the longshoremen and other stevedoring personnel, including plaintiff, as to the dangers to be encountered during stevedoring and cargo operations; to furnish plaintiff with a safe place to work and to provide competent co-employees, agents and subcontractors.

Eleventh: By reason of the premises, third-party defendants Nacirema Operating Co., Inc. and Turner & Blan-

chard, Inc. are liable to third-party plaintiff for any damages in whole or in part that plaintiff may recover from it.

WHEREFORE, third-party plaintiff Weyerhaeuser Steamship Company prays that the third-party defendants Nacirema Operating Co., Inc. and Turner & Blanchard, Inc. answer this complaint and the original complaint herein; [fol. 17] that the third-party defendants be adjudged liable to third-party plaintiff for any damages that plaintiff may recover from it and that it may recover from third-party defendants its costs and disbursements of this action and that it may have such other and further relief as may be just and proper.

Dow & Symmers, By Frederick Fish, A Member of the Firm, Attorneys for Defendant and Third-Party Plaintiff, Office and Post Office Address, 70 Pine Street, New York, New York.

[fol. 18] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THIRD PARTY DEFENDANTS' ANSWER—
Filed September 30, 1953

The third party defendants, Nacirema Operating Co., Inc. and Turner and Blanchard, Inc., answering the third party complaint of the third party plaintiff, Weyerhaeuser Steamship Company, and the complaint of the plaintiff, William Connolly,

Answering the Third Party Complaint of the Third Party Plaintiff, Weyerhaeuser Steamship Company

First: The third party defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the subdivision of the third party complaint of the third party plaintiff, Weyerhaeuser Steamship Company, numbered "Fifth".

Second: Deny upon information and belief all the averments contained in the subdivision of the third party com-

plaint of the third party plaintiff, Weyerhaeuser Steamship Company, numbered "Sixth", except that they admit that on the 4th day of February, 1952, the third party defendant, Nacirema Operating Company, Inc., pursuant to a contract with the third party plaintiff, Weyerhaeuser Steamship Company, was engaged in cargo operations aboard the SS F. E. WEYERHAEUSER on Castle Island, South Boston, and that at said time and place the plaintiff, [fol. 19] William Connolly, sustained certain injuries while in the employ of the third party defendant, Nacirema Operating Company, Inc.

Third: Deny upon information and belief all the averments contained in the subdivision of the third party complaint of the third party plaintiff, Weyerhaeuser Steamship Company, numbered "Seventh", except that they admit that on the 4th day of February, 1952, the plaintiff, William Connolly, was an employee of the third party defendant, Nacirema Operating Co., Inc., while the said third party defendant, Nacirema Operating Co., Inc., was engaged in cargo operations aboard the SS F. E. WEYERHAEUSER on Castle Island, South Boston, at which said time and place the plaintiff, William Connolly, sustained certain injuries.

Fourth: Deny upon information and belief all the averments contained in the subdivisions of the third party complaint of the third party plaintiff, Weyerhaeuser Steamship Company, numbered "Eighth", "Ninth", "Tenth" and "Eleventh".

For a Separate and Complete Defense to the Third Party Complaint Herein, the Third Party Defendants Allege Upon Information and Belief

Fifth: That at the time and place referred to in the third party complaint, the plaintiff, William Connolly, was an employee of the third party defendant, Nacirema Operating Company, Inc., within the meaning of the United States Longshoremen's and Harbor Workers' Compensation Act, and sustained accidental injuries on navigable waters of the United States while engaged in the course of his employment in a maritime employment.

[fol. 20] Sixth: That the third party defendant, Nacirema Operating Company, Inc., duly secured the payment of compensation to its employees, including the plaintiff, William Connolly.

Seventh: That by reason of the provisions of the said Compensation Act, the liability of the third party defendant, Nacirema Operating Company, Inc., to pay compensation under said act is exclusive, and in place of all other liability to the plaintiff, William Connolly, or to any one otherwise entitled to recover damages from the third party defendant, Nacirema Operating Company, Inc., at law or in admiralty on account of the injuries to the plaintiff, William Connolly.

Eighth: That by reason of the foregoing the third party plaintiff, Weyerhaeuser Steamship Company, cannot recover against the third party defendant, Nacirema Operating Company, Inc.

Answering the Complaint of the Plaintiff, William Connolly

Answering a First Cause of Action

Ninth: The third party defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the subdivision of the complaint of the plaintiff, William Connolly, numbered "Eighth", except that they admit that on February 4, 1952, while the plaintiff was working on the bottom of #1 hold on the vessel F. E. Weyerhaeuser, the plaintiff was caused to sustain injuries when a piece of lumber or dunnage fell from the main deck striking the plaintiff on the head.

[fol. 21] Tenth: The third party defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the subdivisions of the complaint of the plaintiff, William Connolly, numbered "Ninth", "Tenth" and "Eleventh".

Answering a Second Cause of Action

Eleventh: Repeat and reiterate all the admissions and denials contained in the foregoing answer which are set forth in answer to all the averments contained in all the subdivisions of the first cause of action of the complaint of the plaintiff, William Connolly, with the same force and effect as if herein set forth at length.

Twelfth: The third party defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the subdivisions of the complaint of the plaintiff, William Connolly, numbered "Thirteenth" and "Fourteenth".

For a Separate and Complete Defense to the Complaint of the Plaintiff, William Connolly, the Third Party Defendants Allege Upon Information and Belief

Thirteenth: That any injuries sustained by the plaintiff, William Connolly, occurred while the said plaintiff was an employee of the third party defendant, Nacirema Operating Co., Inc., within the meaning of the United States Longshoremen's and Harbor Workers' Compensation Act, and said injuries arose out of and in the course of his employment as an employee of the third party defendant, Nacirema Operating Co., Inc.

[fol. 22] Fourteenth: That the third party defendant, Nacirema Operating Co., Inc., duly secured the payment of compensation to its employees, including the plaintiff, William Connolly, and in all respects duly complied with the provisions of said Compensation Act.

Fifteenth: That the sole remedy of the plaintiff, William Connolly, against the third party defendant, Nacirema Operating Co., Inc., is compensation under and by virtue of said Compensation Act.

WHEREFORE, the third party defendants, Nacirema Operating Co., Inc., and Turner and Blanchard, Inc., demand judgment that the third party complaint of the third party plaintiff, Weyerhaeuser Steamship Company, and the com-

plaint of the plaintiff, William Connolly, be dismissed with costs and disbursements of this action.

Galli & Locker, by Frederic J. Locker, A member of the firm, Attorneys for Third Party Defendants, Nacirema Operating Co., Inc., and Turner and Blanchard, Inc., Office & P. O. Address, No. 80 John Street.

[fol. 23] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOTION OF WEYERHAEUSER STEAMSHIP COMPANY FOR A DIRECTED VERDICT IN THE ALTERNATIVE

Defendant Weyerhaeuser Steamship Company moves the Court to direct the jury that if they shall find Weyerhaeuser Steamship Company liable to plaintiff then they shall return a verdict for Weyerhaeuser against Nacirema Operating Co., Inc. for any amount that they may find due from Weyerhaeuser to plaintiff.

Dow & Symmers, Attorneys for Defendant and Third-Party Plaintiff, Office and Post Office Address, 70 Pine Street, New York 5, New York.

[fol. 24] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOTION OF WEYERHAEUSER STEAMSHIP COMPANY TO SET ASIDE VERDICT OR FOR A NEW TRIAL—Filed May 28, 1954

Defendant Weyerhaeuser Steamship Company moves the Court to set aside the verdict entered in the above-entitled action in favor of third-party defendant Nacirema Operating Co., Inc. on May 20, 1954, and the judgment entered thereon on May 21, 1954, in accordance with the defendant Weyerhaeuser Steamship Company's motion for directed verdict in its favor against Nacirema. Defendant's said motion for directed verdict should have been granted because:

1. The evidence conclusively showed that negligence on the part of Nacirema Operating Co., Inc. was the primary and active cause of plaintiff's injuries.

2. As a matter of law, defendant Nacirema Operating Co., Inc. was under obligation to indemnify defendant Weyerhaeuser Steamship Company for any amount that the jury might find due from defendant Weyerhaeuser Steamship Company to plaintiff by reason of passive negligence of Weyerhaeuser Steamship Company.

In the alternative, defendant Weyerhaeuser Steamship Company moves to set aside the verdict in favor of third-party defendant Nacirema Operating Co., Inc. and judgment entered thereon and grant this defendant a new trial against Nacirema Operating Co., Inc. on the foregoing grounds and on the additional following grounds.

[fol. 25] 3. The verdict is contrary to the law.

4. The verdict is contrary to the evidence.

5. The verdict is contrary to the weight of the evidence.

6. There was substantial evidence in this case from which the jury would have been warranted in finding that the injuries to plaintiff were due to negligence of third-party defendant Nacirema Operating Co., Inc.

7. There was substantial evidence in this case from which the jury would have been warranted in finding that negligence on the part of defendant Weyerhaeuser Steamship Company was merely passive in nature.

8. There was substantial evidence in this case from which the jury would have been warranted in finding that third-party defendant Nacirema Operating Co., Inc. was under obligation to indemnify defendant Weyerhaeuser Steamship Company for any loss that Weyerhaeuser Steamship Company might sustain by reason of negligence of Nacirema Operating Co., Inc. in the performance of its contract for stevedoring services.

9. There was substantial evidence in this case from which the jury would have been warranted in finding

that negligence of third-party defendant Nacirema Operating Co., Inc. was the primary active cause of plaintiff's injuries and that any negligence of Weyerhaeuser Steamship Company was merely passive in nature.

10. The Court erred in failing to submit defendant Weyerhaeuser Steamship Company's case against Nacirema Operating Co., Inc. to the jury following the charge [fol. 26] of the Court to the jury in the matter of plaintiff's case against defendant Weyerhaeuser Steamship Company and pursuant to said charge.

Dow & Symmers, Attorneys for Defendant and Third-Party Plaintiff Weyerhaeuser Steamship Company, Office and Post Office Address, 70 Pine Street, New York 5, New York, By William G. Symmers, Frederick Fish.

[fol. 27] DISTRICT COURT OF UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

JUDGEMENT—May 21, 1954

The issues in the above entitled action having been brought on regularly for trial before the Hon. John F. X. McGohey and a jury, on May 17, 18, 19, 20, 1954 and the jury having rendered a verdict in favor of the plaintiff, it is adjudged that the plaintiff have judgment against the defendant, for the sum of $50,000 on the 1st cause of action.

Dated: New York, May 21, 1954

William V. Connell, Clerk.

[fol. 28] IN THE UNITED STATES DISTRICT COURT

Present: Honorable John F. X. McGohey, District Judge.

Docket No. 76-282

Excerpts from Testimony

APPEARANCES

Now comes the Plaintiff by Nathan Greenberg, Esq., and moves the trial of this cause. Likewise comes the Defendant by Messrs. Dow and Symmers, by: William G. Symmers and Frederick Fish, of counsel; Third Party Defendants by Galli and Locker, by O. A. Thompson, of counsel.

Thereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial.

May 18, 1954—Trial continued. Plaintiff rests. Defendant's motions to dismiss denied.

May 19, 1954—Trial continued. Defendant's testimony. Defendants rest. Both sides rest. Parties stipulate discontinuance of Third Party Defendant, Turner and Blanchard, Inc. Defendants renew motions to dismiss. Decision reserved.

May 20, 1954—Trial continued. Summation by both sides. Court starts charge at 2:00 p. m. Marshals sworn and jury retires at 2:45 p. m. to deliberate *Connolly vs. Weyerhaeuser* action. Jury returns at 8:05 p. m. with following verdict: $50,000 for Plaintiff on First Cause (Negligence); for Defendant on Second Cause (Seaworthiness).

Third Party Action—Court orders a directed verdict for Third Party, Defendant Nacirema Operating Co., Inc.

Motions to be made in 10 days.

[fol. 29] WILLIAM CONNOLLY, the plaintiff, having been first duly sworn, testified as follows:

* * * * * * *

Q. Where do you live, Mr. Connolly? What is your home address?

A. I live at 302 West Third Street, South Boston, Massachusetts.

* * * * * * *

Q. Now, what kind of work did you do before your accident? What kind of work did you do?

A. I was a longshoreman.

Q. And how long had you been a longshoreman; how many years?

A. 25 years.

* * * * * * *

Q. What city?

A. Boston.

* * * * * * *

Q. Now, Mr. Connolly, did you get a job on the F. E. Weyerhaeuser, the vessel F. E. Weyerhaeuser, a few days before your accident on February 4, 1952, did you get a job on the F. E. Weyerhaeuser?

A. I got a job, yes. Joe Cumfries hired me.

* * * * * * *

Q. What company were you working for?

A. Nacirema.

Q. Is that Nacirema Operating Company?

A. Yes.

Q. And they are the stevedores that were taking care of the F. E. Weyerhaeuser, the vessel?

A. That is the stevedore, Nacirema.

[fol. 30] Q. Do you remember where the vessel was docked at the time you got your job?

A. The vessel was docked about 13 dock, 13 Castle Island.

Q. Castle Island. What part of Boston is that in?

A. South Boston.

* * * * * * *

Q. Now, who paid you while you were working on the F. E. Weyerhaeuser? What company paid you?

A. Nacirema paid me.

Q. Do you remember the day of the week that you started

to work before your accident, what day it was; do you remember that?

A. No; I know I started Friday; I got hit the 4th of February.

Q. You started work that day on Friday?

A. It must have been about the first.

Q. Now, Mr. Connolly, getting down to the date of your accident, what time did you go to work in the morning?

A. Oh, quarter to eight I went on the ship.

Q. What hold on the vessel were you working in? What was the number of the hold?

A. No. 1, down in the starboard tank.

Q. No. 1, in the starboard tank.

A. Yes; that is where I got hurt.

Q. Do you remember what time it was when you got hurt?

A. Well, it was a quarter to ten when I got hurt, but that is all I remember.

Q. A quarter of ten; and do you remember what you had done between a quarter of eight and a quarter of ten, what kind of work you had done?

A. We went to work on lumber down in the lower hold, took out four or five loads of lumber down in the decks.

* * * * * * *

[fol. 31] Q. Now, had you taken any lumber out of the deep tanks themselves?

A. Yes.

Q. Had you taken any lumber out yet before you got hurt?

A. No.

Q. What were you doing just before you got hurt?

A. I started to make a load of lumber up.

The Court: You were making up a load to be lifted out of the hold, were you?

The Witness: Yes, sir. Make it, after we make it, they lift it up.

Q. How many men were working with you in that hold, if you remember?

A. There would be eight men.

Q. Eight besides yourself?

A. Seven and me, eight besides myself, that is counting the hooker on.

Q. You were working in the after tank, is that right, the offshore after tank?

A. That is right.

Q. Now, I think you told us that you did not actually take any lumber out of that deep tank.

A. The first load.

Q. You were getting ready for the first load, is that right?

A. Yes.

Q. What position was your body in, if you remember, at the time you got hurt; what were you doing at the time you got hurt?

A. I was making up lumber, loading lumber when I was——

The Court: Were you standing up straight or bent over, or what?

The Witness: Just stooping down, you know, to pick up and come back, and it got me on top of the head.

[fol. 32] Q. What happened to you? What happened to you as you stooped over to get the load ready?

A. I know I got hit, that is all I know; I didn't know it for weeks, days.

Q. What is the next thing you remember? Do you remember going in the hospital?

A. When I was in the hospital, I didn't remember for four or five days.

* * * * * * *

Cross examination.

By Mr. Symmers:

Q. Mr. Connolly, at the time of your employment on the F. E. Weyerhaeuser, the ship on which you were injured, how many days had you been on board the ship working?

A. How many days was I on her?

Q. Yes.

A. I ain't too sure. I thought it was Friday morning I went on the ship.

Q. Your accident was on Monday?

A. I worked Friday night, Saturday, Sunday, Sunday night, and we went back on Monday.

Q. Who is your boss?

A. Joe—Hovey O'Brien.

Q. O'Brien?

A. Yes.

Q. Is he with Nacirema?

A. Yes.

Mr. Symmers: That is all.

Mr. Thompson: Just one question.

By Mr. Thompson:

Q. Mr. Connolly, did you work on the ship the first day it docked?

A. Did I work on the ship?

Q. When it first came, the very first day the ship docked.

A. When she came in first I didn't work on her.

[fol. 33] Q. You didn't work on it the first day it came in?

A. I don't know what time she came in, but I went to work on her on Friday. The ship was pretty near finished.

Q. So you didn't see the ship come in?

A. She must have come in Monday—I was working on the Moormac ship when she came in.

Mr. Greenberg: I think it is all.

* * * * * * *

Mr. Greenberg: This is by agreement of counsel that the vessel F. E. Weyerhaeuser has a gross tonnage of seven thousand, two hundred and ten feet, a net tonnage of 4,355 feet, and the length of this vessel is 423 feet and 1/10, and the breadth is 57 feet and 1/10th, and the depth——

* * * * * * *

Mr. Greenberg: And the depth is 34 feet and 8/10ths. It was build in 1944 at Baltimore, Maryland, and it is a freighter, and it carries a crew of 41, and the horsepower is 2,500 pounds.

* * * * * * *

[fol. 34] DOMENIC JOSEPH RAGUSA, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Greenberg:

Q. Mr. Ragusa, will you please tell the jury where you live?

A. I live in South Boston.

Q. Now, will you tell the jury what kind of work you do?

A. I am a longshoreman.

Q. How long have you been a longshoreman?

A. 22 years.

Q. How old are you?

A. 41.

Q. Now, during those 22 years, will you tell the Court and jury what port you worked at as a longshoreman?

A. Just Boston.

Q. Boston, Massachusetts. Now, on February 4, 1952, which is the date of the accident involved in this suit, were you working as a longshoreman?

A. Yes, I was.

Q. And what particular kind of work were you doing on that day?

A. I was driving the winch.

Q. How long have you been working as a winch driver?

A. 18 years.

Q. Do you ever work in the hold down below?

A. Not of recently; I have.

Q. Will you tell his Honor and the jury briefly what a winchman does, that is, what you do as a winchman.

A. Well, the winchman consists of hoisting out the cargo from the hold and placing it on the dock.

The Court: You operate the hoisting device that holds the booms?

The Witness: Hoisting device, booms, yes, sir.

The Court: Very well.

[fol. 35] Q. Coming down to just before February 4, 1952, did you have occasion to get a job on the Liberty vessel F. E. Weyerhaeuser?

A. I did.

Q. And will you tell us who hired you for that job?

A. Well, that particular job I was hired at the 1 o'clock shape-up.

Q. By whom?

A. By Joe Cumfries, who was employed by Nacirema.

The Court: What day was that?

The Witness: That was on a Thursday, I believe.

The Court: When you say 1 o'clock, you mean 1 in the afternoon?

The Witness: One in the afternoon, yes, sir.

Q. Was that on or about January 31, 1952?

A. Yes.

* * * * * * *

Q. Do you remember what time the vessel reached port?

A. About 2 o'clock.

Q. And did you go to work at 2 o'clock?

A. As soon as the vessel was docked.

Q. Do you remember what time that was, about?

A. Around 2 o'clock we went up to the gangway but we had been standing there waiting for the vessel to come in, but we had noticed it coming in.

* * * * * * *

Q. What position did you take when you went on, where did you go on the vessel?

A. Immediately at the winches.

Q. The winches with reference to what hold?

A. No. 1 hatch.

Q. Where are these winches located with reference to No. 1 hold?

A. Well, they are located aft of the hatch.

[fol. 36] Q. Will you tell the Court and jury whether or not at the time that you went to work there was a shelter erected over the winches, over the two winches aft of No. 1 hold?

A. Yes. At this particular ship, like I say, we had been

hired at 1 o'clock and hadn't gone to work until 2, until the vessel had docked, we were right there at the dock waiting for her to come in.

Q. At the time you went to work was there a shelter erected?

A. There was.

Q. Did you erect a shelter?

A. No, not on that particular ship.

Q. Did any men that were associated with you, any of the other winchmen or any other longshoremen, erect it?

A. No, the shelter was built, it was already on there.

* * * * * * *

Q. When did you first notice the shelter on the vessel with reference to No. 1 hold?

A. As I said, I was standing at the dock watching her pull in, right away we had noticed the shelter was built, and my partner had said to me, "Gee, you might as well leave your hammer and nails in your car, here is one tent you won't have to put up."

We make it a habit of having nails, hammers and saws in our car. As soon as a vessel docks, if there is no shelter there we immediately go to work to put one up. This particular vessel we had noticed it; in fact, it wasn't only one shelter, there was four or five shelters.

Q. How many shelters do you recall were already erected on that vessel?

A. I would say there was at least four out of five hatches.

Q. How many hatches are there?

A. There was five hatches on that ship.

Q. Will you tell his Honor and the jury what the purpose of a shelter is?

A. Well, the purpose of a shelter is against wind, snow, rain; we immediately put them up for our own protection. [fol. 37] Q. And whose protection? When you say your protection, whose protection do you refer to?

A. The winchmen.

* * * * * * *

Q. When you say you decide, what is the usual custom on deciding when you are going to put up a shelter; do you

have them on every vessel, or does it depend on circumstances?

A. Well, if we have a vessel that comes in and it only has two hours work we don't bother; but if we have a vessel that has a day, two days or three days of work we build a shelter.

Q. Is there any condition as to whether you are going to put up a shelter—is there any condition as to what the weather is at the time if the vessel is going to remain there, for I think you said, over a day or so.

A. We immediately——

Q. Does it make any difference what the weather is?

A. It doesn't make any difference what the weather is at the time; we prepare for the weather that is coming.

Q. The vessel might arrive and it might be sunny, but if it is going to stay there three-four days——

A. We immediately put it up anyway.

Q. It is for your own protection and your fellow winchman?

A. That is right.

Q. With reference to this shelter that you have testified to that was situated aft of the No. 1 hold of the F. E. Weyerhaeuser, can you tell his Honor and the jury, as you remember it, how high was the shelter, if you remember?

A. I would say the shelter was about 7 feet high.

Q. How wide was the shelter?

A. I would say four or five feet.

Q. Four or five feet wide; and how long?

A. I would say about six feet long.

[fol. 38] Q. As you came up and you saw her for the first time, will you tell us what it was made of?

A. It was just made out of dunnage or lumber and whatever you can grab hold of or whatever they build it out of.

Q. On this particular shelter, what was it made of?

A. It was made out of lumber.

Q. Did you observe anything on top of the lumber at that time?

A. Yes. There was a tarpaulin.

Q. On top?

A. On top.

Q. Now, I think you testified you went to work—that was, I believe, Thursday?

A. Thursday at 2 o'clock.

Q. And you were working unloading—what kind of cargo did this vessel have?

A. Lumber.

Q. Did you work Thursday?

A. Yes, we worked Thursday afternoon.

Q. Did you work the next day?

A. Friday.

Q. And did you work Saturday?

A. Saturday.

* * * * * * *

Q. Before you started did you observe whether any cargo had been removed?

A. Yes, there was cargo already taken out of the 'tween-deck, which we call a 'tween-deck, the first deck.

* * * * * * *

Q. Mr. Ragusa, coming down, I think you have testified that you worked Thursday afternoon, Friday, Saturday and Sunday and Monday. Now, do you remember the day that Mr. William Connolly came to work on that vessel?

A. Well, I know he didn't start the ship. I think it was a Saturday morning.

Q. Is that your recollection?

A. Yes.

Q. Did you know Mr. Connolly before this accident?

A. I did.

* * * * * * *

[fol. 39] Q. You told us you were working on the day of the accident?

A. Yes.

The Court: He said he was working on the day of the accident at the winch at the No. 1 hatch.

Q. What time did you go to work that day?

A. 8 o'clock.

Q. Will you tell the jury what you did at 8 o'clock, what kind of work you did there?

A. Well, if I can remember correctly, 8 o'clock that morning we were cleaning up the lower hold, I think we had worked about an hour, an hour probably and a half, cleaning up the lower hold.

The Court: By that you mean taking out whatever cargo was in that hold?

The Witness: On the tanks, yes, sir.

Q. How long did it take you?

A. About an hour and a half.

Q. And did you operate the winch? Were you working on the winch to do that?

A. Yes, I was on the winches.

Q. Will you tell us what kind of a day it was?

A. I think it was raining, and it was windy.

* * * * * * *

Q. About what time on that day, February 4, 1952, what time did you complete taking the timber out, the timber that remained in the bottom of the hold?

A. About 9:30.

Q. And at that time what was your next job to do?

A. Well, after we had cleared the lower hold and cleared the tank tops we immediately started to go into the tanks, so we had to take two tanks tops off the after tank tops and we placed them over on the forward tank tops, and after [fol. 40] we had done that we had topped our derrick for the after tanks, that is, the boom which hoists the cargo, we had to top that so it would be directly over the after tanks.

Q. And you completed that?

A. We completed that.

* * * * * * *

Q. Looking at that Plaintiff's Exhibit 4 which is represented with figures on your right, will you show the jury where that shelter was constructed on that photograph?

A. Well, this is your inshore winch (indicating); that (indicating) is your offshore winch. In other words, it is called your up and down winch. This one here (indicating) is better known as the striking winch which, as I explained before, carries the load over the side.

This here (indicating), right in between here (indicat-

ing), there isn't too much space, there is just about enough space for a man to get in, and there's two levers, or two handles call them, and that is where the operator stands, in between here (indicating).

This shelter was built right in this area (indicating); in other words, right in here (indicating), right over those handles, in between these——

Q. In between those two handles, you say?

A. No. The two handles are here (indicating), but built right in between these niggerheads or drums, whatever you call them—drums.

Q. And is that where you stand when you are operating?

A. Right here (indicating).

Q. On the day of the accident what winch were you operating?

A. On the day of the accident I was operating both winches.

Q. Both winches?

A. Right there (indicating).

Q. Now, on the day of the accident, looking at Plaintiff's Exhibit 3, will you tell us what position in the bottom of [fol. 41] the hold Mr. Connolly was working?

A. Is that this exhibit here (indicating)?

Q. Yes.

A. Mr. Connolly—in other words, these are two tanks, there's eight men, there's four men working in these tanks and there were four men working in these tanks and there is another man what they call a hooker-on—he is the man that grabs the hook that comes down from this fall and hooks on these two wire straps to bring the load up; he is known as the hooker-on. So usually in his position on those tanks he can go into one tank and hook on a load there and climb up and jump into another tank and hook on another load. So he stands here, and as the hook comes down he pushes it either offshore or he pushes it inshore.

Q. You say there are nine men working on the bottom of that?

A. There was four men in this tank, there was four men in that tank, and the hooker-on, he stands here (indicating).

Q. What was in those tanks? What was in there?

A. Those tanks were completely loaded with lumber.

There had been nothing out of it. We had just started to go down there.

Q. About what time was it that you just started to take out lumber or timber from the deep tank?

A. As I said before, we had finished this deck——

The Court: Didn't he say a few minutes ago that it was about half-past-nine?

The Witness: Yes, sir, that we finished this deck, and after 9.30 we take these tanks off which I would say took five or ten minutes, so they started to make up the loads about a quarter to 10. Excuse me, you asked me something about Mr. Connolly.

The Court: Yes. We started to find out where Mr. Con-
[fol. 42] nolly was and we lost him in the detail. Now let us find out where he was, because that is more important than anything else.

By Mr. Greenberg:

Q. At the time of this accident, Mr. Ragusa, will you point out to the jury where Mr. Connolly was standing?

A. Yes. Mr. Connolly was in this starboard tank, which is near the offshore tank and Mr. Connolly was working right about here (indicating). His partner would be working back of him, which would be in the other end of the tank; in other words, there would be Mr. Connolly here (indicating) and his partner there (indicating), another man here (indicating) and another man here (indicating), and two men stoop down, pick up a piece of lumber and continue to make up a load.

* * * * * * *

Q. Now, do you remember who the hooker-on was there?

A. I just don't know right now. In fact, I think at this particular time the hooker-on usually goes up for the coffee for the holders. He may have gone at that time; I didn't notice.

* * * * * * *

Q. Mr. Ragusa, we have got you down here where you have taken off the deep tank covers and you have topped your boom. What were you doing then?

A. Everything was stopped, everything was idle and we were just waiting for the men to make up a load.

Q. Where were you standing?

A. I was standing right between these winches under the shelter.

Q. Were you doing anything yourself?

A. Nothing at all; everything was stopped. We had to wait until the load was made up.

[fol. 43] Q. Was your winch in operation?

A. No, the winches were stopped, everything was dead.

Q. What happened at that time?

A. Well, I would say it was probably five minutes afterward and I had noticed——

Q. Excuse me. About what time would that be that this accident happened?

A. Five minutes of ten.

Q. All right.

A. About five minutes of ten. The first thing I had noticed was a piece of lumber coming down, so I immediately pushed my head out—in other words, this (indicating) is what they call a coaming, which is part of the hatch, the coamings; well, I was standing back in that and underneath the shelter when I saw this piece of lumber come down; I yelled out, "Watch below." And there was a yell then, a man had got struck with the piece of lumber.

Q. Did you know at the time who had been struck?

A. No, I didn't, not at the time.

Q. Did you see the lumber? What did you see with reference to the lumber that fell into the hold?

A. I see the lumber come by right over my head, directly over my head; it couldn't have come from any other place than over the shelter; it came directly by my head. I yelled below. And a man got struck on the head with the lumber.

Q. What did you do then?

A. Right about that time, my partner had been standing by on deck, and we had heard the yell for a basket, "Man hurt," so my partner immediately took over the winches to get a basket from the dock, that is a basket to hoist the injured person; immediately then while he was doing that I climbed up onto a couple of crossbars that are on the winches to see where this thing came from.

Q. Where did you climb onto?

A. Part of the winch, and looked up. As I said before, it is 7 feet high. So I had to stand on top of the winches to get a view of the top.

[fol. 44] The Court: You mean the top of the shelter?

The Witness: The top of the shelter, yes, sir.

Q. Will you tell his Honor and the jury what you saw on top of the shelter?

A. When I inspected the top of that shelter, there had been a loose piece of tarpaulin on top of the piece that had been nailed down; in other words, there was a piece nailed down, the first piece, and then there was a loose piece on top of this one.

The Court: Loose piece of tarpaulin?

The Witness: Loose piece of tarpaulin, yes, sir. The first piece was nailed down; this piece on the top was loose and there had been two pieces of dunnage laying on there to hold that down.

The Court: Was that the first time that you looked at the——

The Witness: That is the first time I ever looked at the shelter, yes, sir.

The Court: And at the time you looked at it, were there two pieces of dunnage there?

The Witness: At what time, sir? I only——

The Court: The only time you looked at it.

The Witness: Yes, there was two pieces there on top of the tarpaulin.

By Mr. Greenberg:

Q. You say that is the only time you looked at the top of the shelter?

A. That is the only time I looked on top of the shelter.

* * * * * * *

Q. Now, Mr. Ragusa, will you look at that Plaintiff's Exhibit 5 for identification and tell us whether or not in a general outline it represents about the kind of structure which you have been trying to describe to us, a shelter,

[fol. 45] which you say was over the winches on February 4, 1952.

A. Your Honor, yes, I say it would.

The Court: Very well. In other words, it is made up of side pieces and a frame at the bottom and then several pieces nailed across at the top?

A. Yes, sir.

Q. And over the top, and two sides with tarpaulin of some kind?

A. Yes, sir.

Q. Was there some other characteristic, visible characteristic about it which you can explain to us from what you have there? You have another piece of oil cloth.

A. Yes; I can explain that.

Q. And three pieces of wood.

A. Yes.

Q. Would you describe to us what you saw at the time you climbed up on the winch to look at the top of the shelter which you say occurred just about a minute or so after the piece of wood fell down and struck the man?

A. Yes. Immediately after the accident, as I have stated, I climbed up to look at the top of the shelter to see where this piece had come right by me. I would be standing right in here (indicating), underneath here (indicating). It come by me. I immediately get up to look to see where this thing came from, and as I said before, I would get up there to examine it, and this piece had been secured down or tacked down, and this loose piece that I had told you had been on top of that was laying like that (indicating), and as I had get up to look I see a couple of pieces laying on the top like that, loose pieces, that weren't nailed or tied or anything, they were just loose.

By Mr. Greenberg:

Q. Two loose pieces?

A. All I seen at the time was two.

[fol. 46] Q. Do you recall the approximate dimensions of those two pieces of lumber on top of the shelter itself at that time, after the accident?

A. I say they would be 1 inch thick, 8 inches wide, about 4 or 5 feet long.

Q. Do you know what the make of the lumber was?

A. No, I wouldn't know that.

Q. Now, was this piece of tarpaulin that was on top of it, the only piece of tarpaulin, was that piece of tarpaulin nailed or was that loose?

A. Which piece?

Q. This top piece.

A. This top piece was just a loose piece, just like that looks there with these supposedly to be with these to hold this down.

* * * * * * *

Q. Now, after you inspected the top of the shelter, what did you do then?

A. After I examined the top of the shelter I just stood by, and my partner had hoisted Mr. Connolly out of the hold with Mr. O'Brien, which was our gang boss had rode in the basket with him out of the hold and they brought him to the dock and from there on a police wagon came down; they had phoned for an ambulance but a police wagon had arrived before and they had taken him to the hospital which our gang boss, Mr. O'Brien, went with him.

The Court: That is all you saw at that time?

The Witness: Yes, sir.

Q. Did you see Mr. Connolly yourself at that time?

A. No, I didn't.

Q. Now, after Connolly left the vessel, I think you testified, with O'Brien, what did you do then? Did you resume your work?

A. My partner took over then.

Q. And who was your partner?

A. Steve Murphy.

* * * * * * *

[fol. 47] Q. What did you do?

A. Well, I was automatically relieved then.

Q. When did you resume work after that?

A. Well, I didn't leave there; I stood by waiting for Mr. O'Brien to get back from the hospital.

Q. My question is, when did you start to work again, if you remember, about when?

A. I don't think I started to work again until 10 to 12—3 o'clock that afternoon.

Q. Now, after this accident, did you have occasion to see the piece of lumber that struck William Connolly?

A. Yes, I did.

Q. And where did you see that piece of lumber?

A. Mr. O'Brien, after he come back from the hospital, had went down into the deck, brought the piece of lumber out which had struck Mr. Connolly, put it on the load, yelled up to my partner, Steve Murphy, "Tell Mr. Ragusa to take this off, that's the piece that hit Billy." So as the load come out into the top I walked over and pulled the piece of lumber off, and there was blood on it.

Q. Will you describe, as you recall it, what the dimensions of that piece of lumber were?

A. Well, I would say 1 inch thick, 8 inches wide, 4 to 5 feet long.

Q. Will you tell us how that piece of lumber—whether or not that piece of lumber was similar to the pieces of lumber that you have demonstrated on Pla.ntiff's Exhibit 5?

A. Yes. In fact, after I had taken the piece off the load, the hatchmen, which was Paddy Devine, Mr. Murphy, my partner and I examined it with the two loose pieces that were on top and they looked the same.

Q. The same dimensions?

A. The same dimensions.

* * * * * * *

[fol. 48] Q. Now, Mr. Ragusa, was there anything where you were working there at the time of this accident, was there anything on top of you where this piece of lumber could come from?

A. There is no place. A clear view, on the picture you see there there is no other place that could come from.

Q. Could it come from any of the masts or booms?

A. No, because your mast stay is back, back eight or nine feet.

* * * * * * *

Q. At the time of this accident to William Connolly, was there anybody working on top of where you were working aloft?

A. No.

Q. Will you tell us who was working near you at that time?

A. There was nobody working near me.

Q. You were alone?

A. I was alone.

Q. Now, Mr. Ragusa, will you tell his Honor and the jury what the usual custom is of the longshoremen with reference to the type of shelter that they construct on a vessel that comes in?

A. Well, usually if a vessel comes in we automatically put up a shelter; we have one man running the winch while his partner has an hour or two off and where he constructs the shelter. We always carry a hammer, saw and nails in our cars, and sometimes a tarpaulin if it is a fairly new one.

We immediately bring these tools aboard the ship and start building a shelter. Whatever we do we always make sure we don't leave anything loose.

Q. On the shelter?

A. On the shelter.

Q. And what is the reason for that?

A. There's a million things could happen; vibration of the winches; wind, rainstorms blow anything off.

Mr. Greenberg: I think you may inquire.

[fol. 49] Cross examination.

By Mr. Symmers:

Q. Mr. Ragusa, you were working on the Weyerhaeuser as winchman from the day the ship arrived in port?

A. Yes, sir.

Q. That was about what time, did you say? 2 o'clock?

A. About 2 o'clock.

Q. You had been hired at 1 o'clock?

A. Yes, sir.

Q. And you had your hammer and nails with you for the shelter you were going to build on the ship?

A. I didn't say I had my hammer and nails with me; I says we have them in our cars.

* * * * * * *

Q. Well, I may be mistaken. In any case, you came to work in the morning with hammer and nails, is that right?

A. I didn't go on that particular ship with hammer and nails.

Q. Did you have a hammer and nails in your car?

A. In my car.

Q. All right. And those are for what purpose?

A. Those are for putting up a shelter.

Q. When do you put up the shelter?

A. Immediately as the ship gets in.

Q. But this time you went aboard the ship without your hammer and nails?

A. We could see the ship coming in and there was a shelter already constructed in this particular ship, so in that case there was no need for a hammer and nails.

Q. Where were you standing when you first saw the shelter?

A. Right at the cap log as the ship was coming into the dock. That is a piece of wood constructed on the dock.

* * * * * * *

[fol. 50] Q. What was the state of the weather at that time?

A. At that particular time?

Q. Yes.

A. I couldn't tell you at that particular time.

Q. That was the first day you went to work?

A. That is right.

Q. Was it raining?

A. I couldn't tell you; I don't remember.

Q. How about the second day?

A. I know on that particular ship we had one or two, three days of rain. We were on that ship about four days. I would say there was bad weather, there were two or three days of rain.

Q. Would it refresh your recollection if I tell you it was a clear day on the day you first went to work?

A. I wouldn't remember. It is so far, I honestly don't remember.

Q. Now, what did you do when you went aboard the ship?

A. Well, as I explained before, we had noticed the ship coming in and we had noticed the shelters. It is unusual for this thing to be so noticeable because we never have any ships come in with shelters on them.

Q. Had you ever seen it before?

A. No, sir, I never seen it before.

Q. So you noticed it?

A. That is what brought our attention to it, not myself, probably 200 men on the dock.

Q. How many shelters were there?

A. I didn't take particular notice, but I would say there was at least four shelters on the ship that were already erected.

Q. In other words, the ship has four or five hatches?

A. Five hatches.

Q. And No. 1 is the forward one, up by the bow?

A. That is right.

Q. And then 2 is the next to that?

A. Three.

Q. 3, 4 and 5. 5 is aft of the main housing part?

A. Of the—yes.

[fol. 51] Q. Of the bridge.

A. That is right.

Q. So you saw these four?

A. I seen the four.

Q. Did you work at any other winch besides the No. 1 hatch?

A. No, just the No. 1.

* * * * * * *

Q. Did you have another man with you?

A. Yes, my partner.

Q. There are two winches and each one of them has a handle?

A. That is right.

Q. And you work up in Boston so that one man couldn't work in this——

A. That's all you could work in this particular ship, only one man could fit in between those winches.

Q. I just thought there was a different custom in different ports.

When you went to work this shelter you say was already on the ship?

A. Yes, sir, that shelter was already built.

Q. Was it exactly the same on the first day as it was on the day of the accident, as far as you know?

A. Yes, it was.

Q. Did it have this sort of tarpaulin on top of another piece of tarpaulin?

A. The piece that was tacked down.

Q. This was tacked?

A. No, the big piece was tacked down; that top piece was loose.

Q. And there were three loose boards on top of that?

A. I wouldn't say how many was on there; when I got up there to examine the shelter I seen two pieces of board.

Q. How big were the boards?

A. I don't mean to be fresh; I didn't have a ruler or anything to measure them. I am just, where I work regularly we usually know——

The Court: How big was it?

The Witness: I would say 1 inch thick, 8 inches wide and 4 or 5 feet long.

[fol. 52] Q. Your regular practice, if there hadn't been a shelter—you say there was a shelter there.

A. There was a shelter there.

Q. For the moment let us assume there was a shelter there. Your regular practice, if there hadn't been a shelter there, or if there isn't a shelter, is to come aboard with a hammer, nails and build one, is that right?

A. It isn't a custom; we do it ourselves.

Q. Yes.

A. If we see there wasn't a shelter on the ship, if my partner didn't have hammer and nails I would take them aboard.

Q. And that is whether it is sunny, clear, or rain?

A. No matter what the weather may be, we build up a shelter. We don't know what is going to happen in the next

day, so we always put up a shelter; it is to protect us. Even in summertime we put them up from the hot sun.

* * * * * * *

Q. Where do you get the lumber from?

A. Well, constructing these shelters, there is either lumber taken out of the hold of the ship or in these particular lumber ships there is always lumber laying on the decks which they call dunnage.

Q. Dunnage is something that is used to shore up cargo or other——

A. Dunnage, they shore up cargo with dunnage.

Q. It is a piece of wood?

A. That is it, it is a piece of wood.

Q. Is that the way you generally construct a shelter?

A. No. Our main object in putting up shelters is why we carry nails and hammer, is to make sure that everything we put down is nailed down, that we don't leave anything loose.

[fol. 53] Q. In other words, when you build a shelter it is similar to this model here (indicating), except that you don't leave a loose piece of tarpaulin on top, is that it?

A. That is right.

Q. Is the roof straight like that (indicating) or do you slant your roof when you build them?

A. No, the roofs are usually straight.

Q. You don't build it slanting so the rain will drop off?

A. No.

Q. If you get a leak in your shelter how do you get the rain out? Just by the tarpaulin?

A. The tarpaulin keeps the rain out.

Q. Where do you get the tarpaulin from?

A. A lot of times you find a lot of ships which has all tarpaulin, I mean, they might use to cover up their ventilators and something like that, but most times the boss of the longshoremen, usually, Nacirema at the time, has them in a sort of gear shack, you would call it, where they keep their wire straps and tackle and things like that, and we automatically go in ourselves and take it. They are there for the purpose of us having them.

Q. When you get through with the shelter what do you do with the tarpaulin?

A. When we get through with the shelter, that is the only thing we are interested in, the tarpaulin.

Q. What do you do with it?

A. Take it off, throw it back off the deck and throw it in the gear shop; the gear man takes it, takes care of it.

Q. So that you can use it for the next day?

A. For the next ship.

Q. You had been aboard this ship for the 31st of January until—the afternoon of the 31st of January until the [fol. 54] 4th of February, 10 o'clock in the morning when this accident happened?

A. Yes, sir.

* * * * * * *

Q. Then the winch wasn't in operation?

A. No, everything was dead, everything was stopped.

Q. And suddenly this thing went by your head?

A. Yes, sir.

Q. Was anybody around there; did you see anybody else?

A. There was nobody at all around.

* * * * * * *

Q. What were you doing under the shelter at the time of the accident?

A. That was my position.

Q. How long had the winches been idle?

A. Ten minutes.

Q. And you were just sitting there for ten minutes doing nothing?

A. I wasn't sitting; I was standing.

Q. You were standing there for ten minutes. It wasn't a coffee break or anything like that?

A. No, we are never allowed to leave our winches because they are operated by steam, and just the vibration of steam going through the pipes would cause that handle to move up and down which would cause the winch to sag or something, so we don't leave it.

Q. Do you have to keep your hand on it?

A. You don't have to keep your hands on; there is plugs, nails, that you put in to secure them.

Q. Were the winches secure at this time?

A. Yes, they were all secured.

Q. But the ship's winches weren't moving?

A. Not on one hatch.

Q. The ship itself was tied up to the dock?

A. Yes, we were unloading lumber.

[fol. 55] Q. Do you remember whether or not it was raining on the 4th of February, the day of the accident?

A. I think that morning it was raining.

Q. As a matter of fact, it started to rain early that morning, didn't it?

A. I couldn't be sure of it; I think it was raining, though, that day.

Q. Don't you remember that was the first day you really had rain of the four or five days?

A. No, I remember that particular ship, it was one of the windiest ships, windiest days and rainy days.

Q. That day was?

A. That whole ship.

Q. Every day you were on it?

A. No, I am saying there was two or three days rain part of the time.

Q. Are you sure there were two or three days of rain? Which is it?

A. A couple of days.

Q. A couple of days of rain?

A. Yes.

The Court: By a couple do you mean two?

The Witness: Yes.

Q. You mean you had rain both days?

A. I don't know which particular days. I would say out of the four or five days——

Q. I think you ought to remember because the purpose of this shelter is to keep rain off your head.

A. That is right.

Q. And you remember an awful lot about everything else, about how this whole operation works and exactly what was done and who was down there, but you can't remember whether it was raining——

A. I remember it was a couple of days, that is all I can remember.

Q. But can you remember whether it was raining on this particular morning?

A. On this morning I say yes, I think it was raining.

[fol. 56] Q. Isn't it a fact, Mr. Ragusa, that you were building that shelter at the very time this accident happened and that you had dropped a plank of wood?

A. Why would I start building a shelter, four days' work?

Q. Don't ask me why. Is it not a fact——

A. No.

* * * * * * *

Q. Your story is that this ship came into port for the first time in your existence, in your experience that you have ever seen a ship coming into port with four of these shelters; is that right?

A. Yes, sir.

* * * * * * *

Q. Was your shelter leaking at all during any of these four days you were working?

A. No.

Q. You must have had a little occasion to look up and see the roof part, didn't you? Never looked at it?

A. No, never looked up.

* * * * * * *

STEPHEN MURPHY, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Greenberg:

Q. Mr. Murphy, will you tell the jury where you live?

A. 65 Wentworth Street, Malden, Mass.

* * * * * * *

Q. What is your occupation, Mr. Murphy?

A. I am a longshoreman.

Q. How long have you been a longshoreman?

A. 22 years.

Q. And what type of work do you do as a longshoreman?

A. I run a winch.

Q. How many years have you been running a winch?
A. Approximately 20.
Q. Now, calling your attention to on or about January [fol. 57] 31, 1952, when this vessel F. E. Weyerhaeuser docked at Castle Island, South Boston, will you tell his Honor and the jury whether you went to work on that vessel the first day it reached port?
A. Yes, I did go to work on it.

* * * * * * *

Q. And what company employed you?
A. Nacirema.

* * * * * * *

Q. What hold were you assigned to on the F. E. Weyerhaeuser?
A. I was on No. 1.
Q. As what? What was your job there?
A. As a winch man.
Q. Was Mr. Ragusa your partner as winchman on that?
A. Yes, he was.
Q. On the first day that the vessel reached Castle Island, the first time that you went aboard, will you tell us whether or not there was a shelter erected over the winches after of No. 1 hold?
A. Yes, there was a shelter.
Q. Neither you nor Mr. Ragusa or any other longshoreman erected that shelter after of No. 1 hold?
A. No, we did not.
Q. When did you first observe that shelter aft of No. 1 hold?
A. Just when the ship was docking.
Q. What were you doing at that time?
A. We were standing on the dock waiting for the gangway to be lowered so as to go aboard the ship.
Q. Now, when you went aboard, and you have already told us you observed the shelter, can you tell us approximately how high that shelter was, as you remember?
A. It was about 6½, 7 feet high.
Q. And how wide was it?
A. Oh, about that wide, 3 or 4 feet I would say.
Q. 3 or 4 feet wide. How long in length?

A. Six feet.

Q. And what was it made of? What was its composition as you first observed it?

A. The frame was of lumber.

[fol. 58] Q. Did you notice anything on top of that frame?

A. There was a canvas tarpaulin on top.

Q. Now, did you work steady on that vessel from that Friday that you first went aboard to the day of Mr. Connolly's accident on February 4, 1952?

A. Yes, sir, I did.

Q. You worked just on No. 1 hold?

A. That is all.

Q. I forgot to ask you this, Mr. Murphy, but did you observe at any other time whether any other shelters had existed on this vessel when it first reached port?

A. Yes, there were.

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The Court: You saw three others in addition to this one?

The Witness: Yes, sir.

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Q. Now coming down to the day of William Connolly's accident on February 4, 1952, will you tell us your recollection as to whether it was raining that day?

A. Yes, it was raining.

* * * * * * *

Q. And will you tell us your recollection as to whether or not it was a windy day, if you know?

A. I believe it was slightly windy.

Q. Slightly windy. Now, what time did you go to work on February 4, 1952?

A. When I went to work or when I went aboard the ship?

Q. No. What time did you report to work?

A. 8 o'clock.

Q. Did you actually observe the accident to William Connolly?

A. No, I did not.

Q. Will you tell his Honor and the jury where you were on the vessel at that time?

* * * * * * *

The Court: You mean you were on the deck of the ship where those booms and derricks appear?

[fol. 59] The Witness: Yes, sir.

The Court: You were over on the side nearest to the pier?

The Witness: That is right.

The Court: That would be how far from the edge of the hatch?

The Witness: Probably 20 to 25 feet.

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By Mr. Greenberg:

Q. Now, what was it, Mr. Murphy, that first called your attention to this accident? What happened?

A. I heard somebody holler for a basket, a hoisting basket.

Q. What did you do?

A. I went over to No. 1 hold.

Q. And what did you do there?

A. I looked down to see who had been hurt.

* * * * * * *

The Court: Why are we taking so much time on this, Mr. Greenberg? The man says he heard a call for a basket and he went over and he looked in the hold and he saw somebody that appeared to be injured. He didn't see what hit him. Did you?

The Witness: No, sir, I did not.

The Court: Very well. You didn't see anything fall?

The Witness: No, sir.

The Court: All right, let's get along.

By Mr. Greenberg:

Q. Now, I take it you were the winchman that lowered the basket, is that right?

A. That is right.

Q. You also raised the basket—well, will you tell us who was in the basket when you raised it?

A. Both Mr. Connolly and Mr. O'Brien.

* * * * * * *

[fol. 60] Q. Now, did you observe Mr. Connolly when you had raised him in the basket?

A. Not too closely. I was more intent on safely hoisting it ashore.

Q. You didn't really observe him?

A. No, I did not.

Q. Now, where was Mr. Ragusa, or did you notice Mr. Ragusa at the time that you were lowering the basket and raising it?

A. Well, not when I was doing that. Only when I was going in between the two winches I did.

Q. Where was he at that time?

A. He was standing on a part of the winch and a part of the coamings looking at the top of the shelter tent.

Q. Now, after Mr. Connolly had been raised in the basket and taken ashore, did you have any occasion to look at this shelter tent yourself more closely?

A. Yes, I did.

Q. Will you tell his Honor and the jury what you did?

A. Well, Mr. Ragusa had looked up, and at his suggestion—he said, "This is a poor way to make a shelter tent," so we both looked at it and there were those loose pieces on top, which in Boston it never happened, I mean, they are tacked on.

Q. Now, looking at Plaintiff's Exhibit 5, would you say that that fairly represents the way the shelter looked at the time you went up there?

A. Very much so.

Q. Will you tell us whether or not there were two loose boards on top of the shelter?

A. Yes, there were.

Q. Will you tell us to the best of your recollection the dimensions of those two boards as you remember?

A. They were very definitely 1 inch by 8, the length——

Q. By 8 you mean 8 wide?

A. Inch thick, 8 inches wide, that I am positive of, and the length probably 3½ to 4 feet long.

Q. Now, after you inspected the top of the shelter, what did you do then, Mr. Murphy?

[fol. 61] A. I went in and continued working, the other men were making up the lumber.

* * * * * * *

Q. Sometime thereafter did you have occasion to examine the piece of lumber that struck William Connolly?

A. Yes, I did see it.

Q. Will you tell us how that came about?

A. Well, it is the usual practice if anything is to hit anyone that they save it as evidence, I imagine, and when Mr. O'Brien came back from the hospital I was taking a load of lumber out of the hold and he put the piece that had struck Mr. Connolly on top, and I hoisted it up, and Mr. Ragusa took it off on the top deck.

Q. That is the piece of lumber——

A. That had struck Mr. Connolly, that is right.

Q. Will you describe that piece of lumber?

A. Well, in size it was practically the same size as the two pieces that were on top of the shelter tent, except that there was blood on the end.

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Cross examination.

By Mr. Symmers:

* * * * * * *

Q. Have you ever seen a ship come into port before with a shelter on it?

A. Yes, I have.

Q. You have prior to this time?

A. Yes, sir.

Q. What ship was that?

A. I have no idea.

Q. Do you remember when you saw that?

A. Well, very rarely. I have no idea when. It may have been a month or a year before.

Q. Do you know whether the ship came from another port or was it shifted from one berth to another to Boston?

A. No, I mean coming from another port.

Q. You knew it was coming from another port?

A. Yes, sir.

[fol. 62] Q. You don't remember when?

A. No, sir.

Q. You do remember it came from another port?

A. Yes, sir.

Q. On this particular ship, you say there were shelters on the ship when she came in?

A. Yes, sir.

Q. And what hatches were they at?

A. I know that one, No. 1, was one of them, and I know that there were more than one shelter tent erected; I don't know which hatches they were in.

* * * * * * *

Q. Now, what hours did you operate the winch from 8:00 o'clock on, on the day of the accident?

A. From 10:00 until 12:00 and from 1:00 until 3:00.

Q. And what were you doing between 9:00 and 10:00?

A. Well, from 9:00 until approximately 9:30, I was doing nothing, and from 9:30 until pretty near 10:00 o'clock I was helping to rig for the tanks.

The Court: You were helping what?

The Witness: Rig for the tanks.

Q. You were working on one of these booms or some of the gear provided in connection with the booms?

A. Yes, sir.

Q. To get the tank top covers off?

A. No. To get the derricks rigged in position to work the tanks.

* * * * * * *

Q. You did that from when to when?

A. Approximately 9:30 until probably a quarter to 10:00.

Q. What did you do at a quarter of 10:00?

A. At a quarter of 10:00 I did nothing. I went on the inshore side of the ship and just waited until 10:00 o'clock to go to work.

Q. What deck were you on? The main deck?

A. Main deck, yes, sir.

[fol. 63] Q. Were you looking over the hatch, over the hatch coaming at the time of the accident, down into the hold?

A. No, sir; I was on bulwarks of the ship looking over the side.

Q. And that is when you first heard about the accident?

A. Yes, sir.

* * * * * * *

Q. And where was Mr. Ragusa at that time?
A. He was in where the winches is at.
Q. Was he standing under the shelter?
A. Yes, sir.
Q. And then what did you do?
A. Well, I looked down and I saw that there had been a man injured and they were getting ready to take a basket in, so I went in between the winches and took the two falls from the two derricks and took them ashore to hoist the basket in.
Q. Did you lift the basket up?
A. Yes, sir.
Q. With the winch?
A. Yes.
Q. What was Mr. Ragusa doing at that time?
A. Well, he went and looked to see what was the matter with the top of the shelter tent, what had fallen and what was there.

* * * * * * *

Edward O'Brien, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Greenberg:

Q. Mr. O'Brien, would you let us have your home address?
A. 4 Pearl Street, Somerville.

* * * * * * *

Now directing your attention to the four or five days before the F. E. Weyerhaeuser docked at Castle Island, South Boston, Massachusetts, on February 4, 1952, did you work on that vessel?
A. Yes, sir.

* * * * * * *

[fol. 64] Q. What was your job on the vessel?
A. Foreman of the gang.

Q. And how many men were you foreman of on that vessel?

A. Well, there is nine men in the hold, three men on the deck, and two men on the dock.

Q. And you are in charge of all those men?

A. Yes, sir.

Q. Do you work yourself?

A. Yes, sir.

Q. Well, where did you work while the F. E. Weyerhaeuser was docked?

A. I was down in the hold with the men.

Q. You worked in the hold. Now, at the time that the vessel F. E. Weyerhaeuser reached Boston, Massachusetts, on or about January 31, 1952, did you have occasion to look at the deck in and around No. 1 hold?

A. Yes, sir.

Q. And will you tell us whether or not at the time that the vessel docked there were shelters erected over the winches aft of No. 1 hold?

A. Yes, sir.

Q. Were they on the ship when it reached Boston?

A. There was a shelter on No. 1 hatch and there was three more, there was four all together.

Q. Now did you or any of the longshoremen working in the No. 1 hold on the F. E. Weyerhaeuser erect a shelter aft of No. 1 hold?

A. No.

Q. Now, Mr. O'Brien, what day was it, if you remember, that Mr. William Connolly came to work?

A. Saturday morning.

Q. What position did he work in in No. 1 hold?

A. He went down the hold in the starboard side of the ship.

* * * * * * *

The Court: First of all, suppose you tell us where you were. Did you see the accident happen?

The Witness: Well, I was standing down the hold.

[fol. 65] The Court: You were down in the hold?

The Witness: I was down in the hold.

The Court: Was Connolly in the hold with you?

The Witness: Connolly was in the hold; he was in the tank.

* * * * * * *

A. I was standing between the two tanks, between the two tanks.

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Q. And how many feet would you say you were from Mr. Connolly at the time of the accident?

A. Oh, say 10 or 12 feet.

Q. Now did you see the piece of lumber fall on Mr. Connolly?

A. I didn't see it hit him.

Q. Well, will you tell us what happened?

A. I heard someone yell, and the next thing I went over to the tank and I see Mr. Connolly bent over and I lifted him out of the tank, and his head was all split, and I took him out of the tank and I laid him in the after end of the deck.

* * * * * * *

Q. Now what did you do after you took Mr. Connolly and rested him in that position in the hold as you said? What did you do then?

A. We yelled for a basket. The winchman brought the basket; we put him in the basket, and I went out in the basket with him.

Q. Before that, do you know what hit Mr. Connolly?

A. There was 1 x 8 board.

Q. Did you see the board?

A. I seen the board.

Q. Will you tell us how long a board it was?

A. About four feet.

Q. Were you the one that picked up the board after the accident?

A. I picked up the board and put it in the after end; I stood it up in the after end of the ship.

[fol. 66] Q. Was there anything on the board?

A. It was all blood at the end of it.

* * * * * * *

Q. And did you accompany him to the Carney Hospital in South Boston, Massachusetts?

A. Yes, sir.

Q. And, then, did you stay at the hospital?

A. Well, for 10 or 15 minutes.

Q. Then where did you go?

A. I came back to the ship.

Q. Did you resume working?

A. Yes, sir.

Q. Now with reference to that board, did you do anything about the board after that?

A. Oh, when I came back I put it on the load and sent it up on the deck; I yelled up to the winchman, Steve Murphy, that was the board that he got hit by.

Q. Did you at any time ever inspect the shelter yourself?

A. No.

* * * * * * *

Q. You were in charge of that particular gang, were you, in No. 1 hold as foreman?

A. Yes, sir.

* * * * * * *

Q. Was there any officer of the ship telling you what to do?

A. No.

Q. You say you didn't look at the shelter that the winchmen used.

A. No, I did not.

Q. Is it customary for your company to build these shelters when the ship comes in port?

A. Well, they build them.

Q. What do they build them out of?

A. Out of lumber that is around the decks.

Q. They use their own nails and hammers?

A. Yes, sir.

Q. And saws?

A. Yes.

[fol. 67] Q. And do they ever just use a piece of rope to tie around?

A. No, I never saw them using rope.

Q. You have never seen it just lashed around?

A. No.

Q. So to your mind it is a typical shelter, is it?

A. Yes, sir.

Q. Where do the men get the tarpaulin from when they build the shelter, customarily?

A. Off the dock.

Q. Do you have a locker on the dock that belongs——

A. There's gear lockers on the dock.

* * * * * * *

Cross examination.

By Mr. Thompson:

Q. This shelter that was up at this No. 1 hatch at the time the accident happened, was that the same shelter that was up the day the ship docked?

A. Yes, sir.

Q. That was the shelter that was already on the ship at the time it was——

A. It was on the ship when the ship docked.

Q. Neither you nor any of your men had anything to do with the construction of that shelter?

A. No, sir.

Q. The shelter is higher than a person's head, isn't that right?

A. Yes, sir.

Q. So in order to see the top of it they would have to climb up on something to look at the top of it, is that right?

A. Yes, sir.

* * * * * * *

By Mr. Symmers:

Q. Did you inspect the shelter after the accident at all?

A. No.

Q. You didn't inspect it before?

A. No, sir.

* * * * * * *

[fol. 68] FRANCIS JOSEPH COLE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Greenberg:

Q. Mr. Cole, will you tell the jury where you reside.
A. 20 Waverly Place, Everett, Massachusetts.
Q. What is your occupation, Mr. Cole?
A. I am a seaman.
Mr. Thompson: I didn't get that.
The Witness: A seaman.
Q. How long have been a seaman?
A. Twenty-seven years.
Q. How old are you at the present time?
A. Forty-six.
Q. Do you hold any certificate or license from the United States Coast Guard with reference to going to sea?
A. I hold a certificate of identification, stating that I am an able-bodied seaman.
Q. You hold a certificate as an able-bodied seaman?
A. Yes.
Q. Will you tell his Honor and the jury briefly what the duties of an able-bodied seaman are.
A. An able-bodied seaman's job on a ship is to secure the ship for sea, steer, stand watches, stand lookout, paint, chip, scrape, keep the ship in good condition.
Q. Tell us the last vessel you served on before coming to court here, and when you got off it.
A. The last vessel I was on was a coal collier sailing out of Boston—the last vessel I sailed on was a coal collier sailing out of Boston.
Q. When did you get off that vessel?
A. A month ago.
Q. A month ago?
A. About a month ago.
[fol. 69] Q. What was the reason you got off that vessel?
A. The vessel tied up.
Q. Before that, will you tell us the name of the vessel that you worked on.
A. I was on the S/S Examiner sailing to India.

Q. Is that a general cargo ship?
A. It is a general cargo ship.
Q. Does it carry general cargo?
A. General cargo.
Q. What type of construction is the vessel?
A. It is similar to a C-2 but it is built on specifications of the Export Lines.
Q. How many holds on that vessel?
A. On that particular vessel, seven.
Q. And are the winches situated at each hold?
A. The winches are situated at each hold.
Q. At each hold?
A. Yes.
Q. Now before that vessel, will you tell us the name of the vessel that you were on.

The Court: Pardon me just a minute. Mr. Greenberg, is this witness going to be in the nature of an expert?
Mr. Greenberg: That's right, sir.
The Court: Very well. It is not claimed that he was a member of the crew of the ship on which the accident occurred?
Mr. Greenberg: That's right, sir.
The Court: I see. All right.

A. Previous to that I was on a Liberty ship, I was running to Cairo on it. The name of it was the Catherine Golundaris.
Q. Who operates that vessel?
A. Orion Steamship Company.
Q. How many holds were there on that vessel?
A. Five.
[fol. 70] Q. Is that the usual Liberty construction?
A. That is the usual Liberty construction.
Q. How long were you on that vessel?
A. Seven months.
Q. Now prior to that you worked on other Liberty vessels, didn't you?
A. Countless.
Q. What?
A. Countless.
Q. And you have been working steady as a seaman, is that correct?

A. All my life.

Q. Now besides being an able-bodied seaman, did you also serve in the capacity of boatswain?

A. Many times.

Q. Will you tell his Honor and the jury what the duties of a boatswain are on a vessel.

A. The duties of a boatswain is like a foreman ashore; he is in charge of ten men as the average crew of a Liberty ship; he sees that the work is done properly and the work is done safely, sees that the ship is secured properly when it leaves port, and carries out other duties in the maintenance of the ship.

Q. Mr. Cole, you know what the purpose of a shelter is on a vessel, don't you?

A. I do.

Q. Will you tell his Honor and the jury what the purpose of a shelter is.

A. Longshoremen build them to keep out the elements, particularly rain, snow, wind and sun.

Q. Is this done in every port that you come to, usually, in the United States?

* * * * * * *

A. These things are built by longshoremen in every port that you enter in this country.

Q. Now, Mr. Cole, what is the usua' practice and custom aboard ship when the vessel leaves port when there exists on the vessel a shelter that had been erected by longshore- [fol. 71] men?

A. Well, these shelters, they are sometimes tied up with rope yarn and sometimes constructed——

The Court: First of all, before your get into that, let us find out is there a practice.

Q. Is there a practice?

The Court: On the basis of your experience, serving on these cargo ships, are you able to say whether or not there is any practice with respect to the maintenance of shelters after the men who used them have finished their job and left the ship?

The Witness: It is the custom and good seamanship to knock them down.

Q. Is there a custom or practice——

The Court: You say there is a custom?

The Witness: It is the custom.

The Court: What is the practice, what is the custom? To knock them down?

The Witness: To knock them down.

The Court: Very well.

By Mr. Greenberg:

Q. When is that done, Mr. Cole?

A. This is done as we square the decks, as we move from No. 1 back to No. 5 we are squaring the decks away, the lowering booms or topping booms.

The Court: You say squaring the decks. That is an expression that I suppose is understood by the people who work on ships, but just remember that we are all land-[fol. 72] lubbers. Tell us what you mean by squaring the decks. You mean clearing it up and putting it in good order?

The Witness: Squaring, putting things where they belong, piling lumber, or whatever the case may be, to the side of the ship so that there will be a clear passage for the sailors to walk and there will be no hazards of falling lumber in the evening, or going to dock—going to lookout, and these are destroyed for safety, a safe purpose, because they are so flimsy if they are left up and we had any high winds, why, that timber will fly and probably strike somebody, knock a porthole out or something like that.

By Mr. Greenberg:

Q. Will you tell us when that is done with reference from the time that you leave port—when is the shelter taken down?

A. This is done as they move from 1 to 5.

Q. My question is——

A. For the squaring away of the deck as we go back, as we——

The Court: Try to get it into the time that you pull

away. Are you saying that as you pull away from the dock you immediately start to square away at No. 1?

The Witness: That's right.

The Court: And then as you go back?

The Witness: As we go back we destroy them.

The Court: I see. So that as far as time is concerned, that is done just about as you start to pull out?

The Witness: That is part of the squaring away.

The Court: All right.

Q. Does anybody give you an order, any of the mates or the captain give you an order to do that?

[fol. 73] A. Well, it's a standing order and it is particularly not necessary to tell a seaman that. If he is a good seaman he knows that they must be torn down, for the simple reason that they interfere with the sailors squaring the booms; he can't see when a man is on the guy bringing in the yard, and they are a menace to a sailor when he is squaring away the deck.

Q. If you are working as a boatswain, the mate is over you there?

A. Chief officer.

Q. That is the chief mate, is that right?

A. First mate.

Cross examination.

By Mr. Thompson:

Q. Well, according to the custom, you say that these shelters are always taken down before you—when you are leaving the port where they are put up, is that correct?

A. Well, it all depends who is the mate or who is the boatswain on there. If the man is——

The Court: Your testimony is that it is standard practice on a well-run ship to remove them?

The Witness: On a well-run ship.

By Mr. Thompson:

Q. You take them down immediately, is that right?

A. Yes, sir.

* * * * * * *

WILLIAM J. MURPHY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Greenberg:

Q. Captain Murphy, where do you live?
A. 112-35 197th Street, St. Albans.
Q. What state?
A. New York State.
[fol. 74] Q. How old are you?
A. Sixty-seven years old.
Q. What occupation do you follow?
A. Master mariner.
Q. Do you hold any licenses as master mariner from the United States Coast Guard?
A. United States Coast Guard.
Q. What does that license provide for?
A. Well, take any ship, any tonnage.
Q. As captain?
A. As captain, any port of the world.
Q. Any port of the world?
A. Unlimited.
Q. How long have you had that license?
A. Thirty-four years.
Q. During your work as a captain, will you tell us what kind of vessels you have been on.
A. I have been on cargo ships, passenger ships, different types of vessels; I have been on sailing vessels.
Q. And have you been to many lands?
A. Well, all over the world.

The Court: Keep your voice up a little, Captain.
The Witness: All over the world, sir.

Q. Are you familiar with the shelters that are erected on a merchant vessel?
A. Yes.
Q. Will you tell his Honor and the jury what the purpose of a shelter is.

The Court: You have heard the other witnesses testify here about shelters?

The Witness: Yes, sir.

The Court: Is your description of a shelter the same as theirs, or different?

The Witness: Exactly the same as this last man testified, sir.

The Court: Very well.

[fol. 75] By Mr. Greenberg:

Q. Captain, when shelters have been erected on a vessel by longshoremen and the vessel leaves the port, what is the usual practice and custom with respect to the shelters?

A. It is the custom to take them down.

Q. Immediately or——

A. Well, you see, I can explain it this way. When one hatch gets through the crew usually goes to work and secures that hatch for sea, at that time it might happen, but before she leaves port.

Q. The usual custom is to take them right down?

A. Take them down.

Q. What is the reason for that?

A. Well, they are a hazard.

Mr. Greenberg: I think that is all.

The Court: You have heard the previous witness describe the various types of hazards that he thought they constituted. Would your testimony be the same with respect to that?

The Witness: Yes, sir.

* * * * * * *

Andrew G. Dantzler, called as a witness on behalf of Weyerhaeuser Steamship Co., being first duly sworn, testified as follows:

Direct examination.

By Mr. Symmers:

Q. Captain Dantzler, where do you live?

A. Huntington, Long Island.

Q. By whom are you employed?

A. Nacirema Operating Company.

Q. What is the Nacirema Operating Company?
A. Contracting stevedores.
Q. Where is their main office?
A. 21 State Street.
[fol. 76] Q. And do you have an office in Boston?
A. Yes, sir.
Q. And do you do the stevedoring for the Weyerhaeuser Steamship Company?
A. Yes, sir.
Q. In January and February 1942 did your company do the stevedoring for Weyerhaeuser Steamship Company?
A. 1942?
Q. 1952.
A. Yes, '52.
Q. And in what ports did they do that in?
A. They did it in Boston; Portsmouth, Rhode Island; New York; Philadelphia; Baltimore; Norfolk.
Q. Do you have an office in Boston, too?
A. Pardon?
Q. Do you have an office in Boston, too?
A. Yes, sir.
Q. Now is the stevedoring done pursuant to contract with Weyerhaeuser Steamship Company?
A. Yes, sir.
Q. Is this a copy of the contract that was in effect at the time, in January or February 1952?
A. Yes, sir.
Q. Is that signed by you, Captain?
A. Yes.
Q. As vice-president of the Nacirema Operating Company?
A. Yes.
Mr. Symmers: If your Honor please, I offer this in evidence as Defendant's Exhibit——

* * * * * * * *

The Court: You object to all those parts as being irrelevant?
Mr. Thompson: That is right.
The Court: That objection is overruled.
Now you will mark the contract for identification and you

will read to the jury, if you desire, such parts as I have ruled on, without reading any other part of the contract.

(Defendant's Exhibit A for identification.)

Mr. Symmers: Ladies and gentlemen of the jury: This is the stevedoring contract, and as you have just heard, [fol. 77] it is not going in evidence in toto because it has to do with a lot of things that have nothing to do with this case, as well as things that may.

The contract provides—it is dated October 1, 1951, entered into between Weyerhaeuser Steamship Company and Nacirema Operating Company as the stevedoring contractor, herein called the Contractor:

"Contractor undertakes to faithfully furnish such stevedoring services as may be required upon such vessels as are assigned to the Contractor, at the agreed rates, terms, and conditions specified below.

"As part of the foregoing specified rates, the Contractor agrees to include in the commodity rates the following described services:

"a. Transport Contractor's gear and equipment to and from the pier where the vessel is berthed, excepting locations that are inaccessible to motor trucks.

"b. Provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor and dock crane operators, also foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work.

6. Equipment: The ship is to supply booms, adequate winches, in good order and with sufficient steam or current for their efficient operation; blocks, topping lifts, guys; wire or rope falls of sufficient length and strength, hatch tents, lights for night work; tugs; der- [fol. 78] ricks or cranes fo such heavy lifts as exceed the capacity of the ship's gear, and cranes in the absence of ship's winches. The ship is also to supply dunnage, paper and all material for shoring and lashing cargo as well as grain bags and separation cloths.

"The Contractor is to supply all other cargo handling gear and equipment, such as hooks, pendants, save-alls,

nets, trays, bridle chains and slings (except slings for heavy lifts when hoisted by heavy lift floating or shore derrick) also hand trucks, mechanical trucks or tractors, also dock tractor cranes as needed for efficient stevedoring work."

By Mr. Symmers:

Q. Captain, you just heard me read from this contract. Could you tell the jury, if you will, what a hatch tent is?

A. Well, there are different types of hatch tents that are used.

* * * * * * *

The Court: Very well. All right. You all agree that a hatch tent isn't the type of shelter that is in question in this case. All right.

By Mr. Symmers:

Q. Captain, when a ship is discharged in Boston by your company, who is in charge of the discharging?

Mr. Thompson: I object to that, sir. It is a question of who is doing it at this time.

* * * * * * *

[fol. 79] The Court: Who was in charge from January 31, to February 4, 1952, if you know?

The Witness: We have a superintendent, a general manager in charge of all the operations in Boston, and that was Mr. L. C. Howard, Jr.

By Mr. Symmers:

Q. And under Mr. Howard at that time did you have foremen in charge of each individual ship as they came into port?

A. We have a head foreman in charge of each individual ship that is working. We also have assistant foremen on the ship. Each hatch that is working on a ship has a gang foreman, known as a hatch foreman, that covers the supervision of each individual operation on a ship.

Q. Is the hatch foreman, or as of that time was it a fact

that the hatch foremen were regular employees of Nacirema Operating Company?

A. Well, the majority of the men in Boston, I would say, are regular employees of Nacirema Operating Company. They work for different contractors. We have three or four days that we don't have a ship, then they work for another contractor that does have a ship to work.

* * * * * * *

PAUL B. HYATT, called as a witness on behalf of Weyerhaeuser Steamship Company, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Symmers:

Q. Captain Hyatt, you are the master of the steamship F. E. Weyerhaeuser?

A. Yes, sir.

Q. Will you tell us when and where you were born?

A. I was born in St. Louis, Missouri, July 31, 1904.

[fol. 80] Q. And are you married, sir?

A. Yes, sir.

Q. Any children?

A. Grown. One.

Q. How long have you been going to sea?

A. Well, since I was 15. That would be 34 years.

Q. What license or certificate do you hold, Captain?

A. Master, unlimited, of oceans.

Q. Are you now employed aboard the F. E. Weyerhaeuser as captain?

A. Yes, sir.

Q. How long have you been captain of that ship?

A. Seven years.

Q. Prior to that were you captain of other ships?

A. Yes, sir.

The Court: How long have you held your master's certificate?

The Witness: 23 years, your Honor.

* * * * * * *

Q. You were master of the F. E. Weyerhaeuser in January and February 1952?

A. Yes, sir.

Q. Captain, I show you a document entitled Chief Officer's Log Book and ask you if you can tell us what that is and identify it.

A. Yes, sir. This is the vessel smooth log of the F. E. Weyerhaeuser for voyage 18 eastbound.

Q. Is that a record of times and places of the movements of your vessel primarily?

A. Yes, sir.

Q. Does it also contain a record of the ship's speed and the weather when you are at sea?

A. Yes, sir.

Q. And also in port, the weather?

A. Yes, sir.

Q. Does it contain a time record as to loading and discharging operations in general?

A. Yes, sir.

The Court: Keep your voice up a bit, Captain.

[fol. 81] Q. I notice that pages of this log are signed by you, Captain, as well as by the chief officer. Is this your signature on the entry for January 31, 1952?

A. Yes, sir.

Mr. Symmers: I offer these as defendant's exhibits. I think they could be marked——

* * * * * * *

The Court: You have A for identification, and B is the smooth log; now, C will be the rough log.

Mr. Symmers: C will be the rough log.

(Marked Defendant's Exhibits B and C.)

Q. Captain, will you tell us the voyage on which the F. E. Weyerhaeuser was engaged in December and January, 1951, 1952, Dece*bemr* 1951 and January 1952?

A. That was voyage 18 eastbound, sir.

Q. And the Weyerhaeuser is an intercoastal ship, is it?

A. Yes, sir.

Q. She operates on the west coast through the Canal to the east coast?

A. That is correct.

Q. And then back again to the west coast?

A. Yes.

Q. And coming east, what is the cargo you usually carry?

A. Predominantly lumber, sir.

Q. And westbound, what do you carry?

A. General cargo.

Q. Now, on this occasion, voyage 18, can you tell us the port from which you sailed and the ports to which you proceeded from the original port? You may refresh your recollection, if you can't remember independently (handing).

A. Thank you, I would like to.

(Referring to books) The vessel sailed from Longview, Washington, with a load of lumber. That was on January 1, 1952, bound for New York Harbor, first port of discharge.

[fol. 82] Q. Is that the first port of the beginning of voyage 18-E?

A. No, sir, that was the final sailing from the Pacific Coast, with a full load.

Q. Well, you commenced at Seattle. Did you load anything at Seattle?

A. I don't see an indication that the vessel loaded at Seattle. However, she loaded at a port very close to Seattle called Tacoma.

Q. Where did she go from Seattle?

A. Tacoma.

Q. You took on cargo there?

A. Yes.

Q. And from Tacoma to where?

A. Tacoma to—then to Seattle, where we did some loading.

Q. Then from Seattle to where?

A. Seattle to Raymond, Washington, which is located in Willapa Harbor.

Q. Is that another lumber port?

A. Yes, strictly lumber.

Q. Did you load there, too?
A. Yes.
Q. From Raymond where did you go?
A. To Longview.
Q. And you completed loading at Longview?
A. Yes, sir.
Q. For the east coast?
A. For the east coast.
Q. And your first port of call on the east coast was New York, is that right?
A. Yes, sir.
Q. What type of cargo were you carrying to New York?
A. Lumber.
Q. How was that lumber stowed; was it under deck or on deck, or both?
A. Both.
Q. You had a deck cargo?
A. Yes, sir.
Q. And when you carry a deck cargo, or when you were carrying this deck cargo did that deck cargo cover the hatches on the main deck?
A. Yes, sir.
Q. Did that include No. 1 hatch?
A. Yes, sir.
Q. You heard the longshoremen from Boston yesterday, Captain, testify about this structure, shelter, that they say was built between the two hatches at No. 1 hatch for the [fol. 83] protection of the winch driver; did you hear that?
A. Yes, sir.

* * * * * * *

Q. Captain, did you hear the testimony that this shelter was approximately 7 feet high?
A. Yes, sir.
Q. Now, in the situation in which your cargo was loaded with deck cargo—from Long Beach was it?
A. Longview, sir.
Q. (Continuing) —Longview, would it be possible for such a structure to have been aboard your ship after she was loaded with deck cargo at Longview?
A. No, sir.

Q. Can you tell us why?

A. In the stowage of a lumber deck cargo the lengths run out continuously along the deck and they ride right over the area that the winches are contained in; therefore, it would be impossible for a structure like that to be there.

* * * * * * *

Q. When you came into New York, what day was that, Captain?

A. That was January 25th, sir.

Q. 1952?

A. 1952.

Q. And at that time did you still have deck cargo?

A. Yes, sir.

* * * * * * *

The Court: At the time you arrived in New York, where did you have deck cargo?

* * * * * * *

A. Well, it was on deck, your Honor.

By the Court:

Q. What part of the deck? Was it over the No. 1 hatch?

A. Completely all over the vessel deck, all hatches.

Q. Was it in that condition that you have described before, running over the area where the winches are?

A. Yes, sir, it was in the same condition as when the vessel left the west coast.

[fol. 84] The Court: All right, go ahead.

By Mr. Symmers:

Q. Captain, when you arrived at New York, was there any structure such as is sometimes or customarily built by longshoremen for the protection of the winchmen from rain, wind shelter or rain shelter?

A. No.

Q. Was there any structure on your ship at the time you entered New York Harbor such as that?

A. No, sir.

Q. Where did you dock in New York Harbor?

A. (Refers to book) The vessel docked at Green Street pier, That is in Brooklyn, sir.

Q. That is the foot of Green Street in Brooklyn.

A. Yes, sir.

Q. Was she discharged partially at Green Street?

A. Yes, sir.

Q. Of her lumber cargo?

A. Yes, sir.

Q. Was the deck cargo taken off in the course of that discharging operation?

A. It was.

The Court: All of it? All of the deck cargo?

The Witness: Yes, sir.

Q. And some of the under deck cargo, too?

A. Yes, sir.

Q. Was that work performed by a stevedoring company?

A. Yes, sir.

Q. Who was that done by?

A. Nacirema Operating Company.

Q. How long were you in New York?

A. (Witness refers to book).

Q. I will withdraw that for a moment. What days were you in New York on this occasion?

[fol. 85] The Court: You already have that he arrived on the 25th. Can you tell us when you left New York?

The Witness: The vessel left New York on January 30th, your Honor.

Q. What time did she leave New York?

A. At 5.57 a.m. the vessel sailed from the dock.

Q. And what time did she arrive at Boston? 5.57 a.m. on January 31, that is?

A. January 30th, sir.

Q. January 30th.

A. On January 31st, at 2.22 p.m. the vessel was made fast to the dock in Boston.

Q. Captain, when you arrived at Boston, were there any structures such as this——

Mr. Symmers: What is the name of this?

Mr. Greenberg: Shelter.

Q. (Continuing) —Plaintiff's Exhibit 5, or winchman's shelter on your ship?

A. No, sir.

Q. Captain, you heard the witness yesterday, an able-bodied seaman, who testified with respect to the custom at sea of disposing longshoremen's shelters such as this, did you not?

A. Yes, sir.

Q. Do you agree with what he stated as to the custom carried out at sea with regard to the disposition of these shelters as part of making the ship ready for sea?

A. Absolutely.

Q. Is that an invariable order on board your ship that that shall be done?

A. Always.

Q. In your 34 years of sea experience have you ever been on a ship that arrived in any port with a wooden structure that had been left by longshoremen at the prior port?

A. No, sir.

[fol. 86] Q. Will you tell us the general method of making your ship ready for sea after she has left the dock? What is the general practice on your ship?

A. As soon as the vessel is clear of the dock it is the invariable practice for the ship's crew to proceed along the various cargo gears and set them, as we call it, for sea, which means to put them in a condition that would allow them to ride safely while the vessel is at sea, and to clear the decks, amongst which can certainly be called the elimination of shelters of this kind. It is automatically done.

Q. You are the commanding officer of your ship; in other words, you are the top boss?

A. Yes, sir.

Q. As captain. And who is next in command to you?

A. My chief officer.

Q. Did you have a chief officer on this occasion from New York to Boston on January 30th?

A. Yes, sir.

The Court: Keep your voice up a bit, captain.

Q. What are his responsibilities, if any, captain, with respect to clearing the decks after a ship sails?

A. A chief officer is definitely the officer in charge of the deck; he is the top ranking officer on the vessel under me, over-all control, with direct responsibility that the normal safe procedures of securing a deck for sea are carried out.

Q. Are any inspections made of the decks after this work is carried out in the regular course of your steamship operations?

A. Yes, sir.

Q. By whom are those inspections made?

A. They are made by myself as master of the vessel; and placing myself in a position of a chief officer, which I definitely was before I became master, they at that time were made by me as chief officer, and on ships that I sail on, why, the chief officer does the same thing; in other words, they are made by both the master and the chief officer.

[fol. 87] Q. Did you make an inspection on this occasion, to your recollection?

The Court: You mean when he left New York?

Q. After the ship had left New York, as to whether the decks were clear and seaworthy?

A. I always made an inspection, sir. It follows that I did on that occasion.

* * * * * * * *

By the Court:

Q. As a result of that inspection, is it your testimony that there was no such shelter in the area of the winches at the—aft of the No. 1 hatch at the time you left New York on this voyage?

A. As soon as the vessel's decks were cleared, your Honor, that they would be.

Q. That is what I mean, at the time you made this inspection.

A. Yes.

Q. To be sure that it was all clear; that inspection revealed no shelter, according to you, at that time?

A. Yes, sir.

The Court: All right.

By Mr. Symmers:

Q. When you left New York, Captain, was the deck gang called out to make the ship fit for sea?

A. Yes, sir.

Q. What time was that done?

A. Directly after leaving the dock; that would be somewhat after 6 o'clock in the morning.

Q. Is there any entry in the log book that might refresh your recollection as to the exact time?

A. The log book shows an entry time at 7.48 a.m. on January 30th, which indicates that the vessel took a departure at Execution Rock; that would place the vessel in a clear position as far as any harbor interference was [fol. 88] concerned, and the work would be performed along about that time.

It is not customary to enter that sort of a regular thing as a record in a log book.

Q. Captain, how did you proceed from New York to Boston; by what route?

A. On this voyage in question the vessel went up through Long Island Sound and Cape Cod Canal, across Cape Cod Bay to Boston.

Q. At any time was she in the open sea?

A. Cape Cod Bay could be classified as such, yes, sir.

Q. You passed Block Island?

A. Yes.

Q. On which side, the seaward side, ocean side?

A. I do not recall, sir.

Q. Could you tell from your log book?

A. Probably. That is all pilotage waters through there, sir. (Referring to book) The vessel's entries there are not sufficiently informative for me to determine which way she went. She was in charge of a pilot as far as her maneuvering was concerned.

Q. They have a coastal pilot to navigate the ship from New York to Boston through inland waters; is that right?

A. Correct.

Q. Your ship was under way, then, all the day during daylight of January 30th, is that right?

A. Yes, sir.

Q. And you arrived and docked at Boston on the afternoon of January 31st; at 2:15 your ship was made secure; is that right?

A. 2.22, sir.

Q. 2.22. What speed does your ship make, captain, on a voyage; what ship's speed was she making through the sea?

A. About 12 knots, sir, an hour.

Q. About 12 knots an hour. That is how many miles an hour—automobile?

A. Mile and an eighth.

Q. More than 12 miles an hour?

A. I would say about 13½.

[fol. 89] Q. Were you heading in any winds?

A. Yes, sir.

Q. What was the strength of those winds? Are they entered in your log book?

A. They would be, sir.

Q. What does that show?

A. The general weather entries for the greater part of the day shows winds of direction of north-northwest with a force average 4 for three watches—no, 4 for 4 entries and 3 for 1 entry; in other words, three-fourths of the time a force of 4.

Q. What is the force 4 in miles an hour?

A. Force 4 in miles an hour would be approximately 20 miles an hour, sir.

Q. And part of that time on that north-northwest wind was your ship heading into the wind?

A. Yes, sir.

Q. So the actual force of the wind against the man standing on the foredeck would be what, captain, in those circumstances?

A. It would be the sum of the approximate 20 miles an hour of the force of the wind plus the approximate 12 or 13 miles an hour of the progress of the ship, which would add up to around 33 miles an hour, something like that.

Q. And, in addition to the wind, captain, was there any sea whatsoever, that is, any waves?

A. Yes, sir. She has entries for that period of time covering small sea and swell to moderate sea and swell,

the small sea and swell being on January 30th and the moderate being obviously in the Cape Cod Bay on the 31st.

Q. How much motion do you get on a ship with a moderate sea and swell, captain, on your ship, with a partial load of lumber?

A. It would be motion enough to require a person to hold on as they attempted to move from one place to another.

Q. Constant pitching or rolling, is that not right?

A. Correct.

[fol. 90] Q. Captain, you heard the testimony here yesterday by three men that your ship came into port with four of these structures aboard.

A. Yes, sir.

Q. Do you admit it or do you deny it?

A. I deny it.

Q. Now, assuming that such a structure as this, which these three men said yesterday was aboard ship when you docked, was in fact aboard from your trip from New York to Boston, with three dunnage boards laid over a loose piece of tarpaulin, with some extra protection against an underneath piece of tarpaulin upon the roof, dunnage boards being——

Mr. Symmers: What were they?

Mr. Greenberg: One inch thick.

Q. —one inch thick, eight inches wide, and three or four feet long, captain, in your experience as a seaman of 34 years and under the conditions that you encountered going from New York to Boston, do you believe it is possible for that piece of tarpaulin to have remained on top of the structure such as that, assuming it had stayed there with three boards on top of it throughout your entire voyage until you got to Boston?

* * * * * * *

Q. You may answer, captain.

A. I would say it is utterly impossible, sir.

Q. Why captain?

A. Because the very movement of the ship and the draft of the wind which affects everything along the deck of a ship would certainly have blown that off.

Q. Do you think a structure such as that itself would

have remained under the conditions and the weather and sea that you encountered?

A. I would say that the structure could remain, yes, sir.

[fol. 91] Q. Would or could?

A. Could.

Q. But you do say it is impossible in your opinion and experience for that tarpaulin to have remained, had it been there?

A. I do, yes, sir.

* * * * * * *

Cross examination.

By Mr. Greenberg:

Q. Captain, I believe you said that you worked on this vessel for five years; is that right?

A. Seven years.

* * * * * * *

Q. How long have you worked for the Weyerhaeuser Steamship Company?

A. This will be my 29th year, sir.

Q. Will you tell the jury when you started 29 years ago what your position was for the company, when you started out?

A. I was an able-bodied seaman, sir.

* * * * * * *

Q. And then, I take it, from 1936 to 1954 you have been master for this company?

A. That is correct.

Q. Eighteen years, is that right?

A. Just about.

Q. And you have been on different vessels that you have testified to owned by this company, is that right?

A. Some of the vessels were owned by this company, others were operated by the company during the war.

* * * * * * *

Q. Captain, you were not on board when this accident happened on February 2, 1952, were you? A. I don't recall, sir.

* * * * * * *

The Court: At any time on February 4th did you know that there had been an accident aboard your ship?

[fol. 92] The Witness: I do not recall that I did, sir.

* * * * * * *

Q. Now, captain, when the vessel was in New York prior to coming to Boston, I believe you said they were there between January 27, 1952, and January 30, 1952; am I correct on the dates on that?

A. That is so; I believe so.

Q. Will you tell us whether shelters were erected by the New York longshoremen during that period, from your recollection?

A. Oh, no, I don't know.

Q. Well, you testified here that you know that there were no shelters on the vessel when it reached Boston.

A. That is correct.

Q. But you don't know whether the New York longshoremen put them up on your vessel while she was here three days in New York?

A. That is right.

Q. Your memory is good on one phase but not so good on the other phase, is that right?

A. No, that is not right. It is very good on both phases.

Q. Now, I think you testified here that the deck cargo was unloaded in New York; is that correct?

A. Yes, sir.

Q. All the deck cargo was unloaded in New York?

A. Yes, sir.

Q. And also part of the hold itself was unloaded?

A. Yes, sir.

Q. Now, it could have been that the shelters were erected by the New York longshoremen during that period?

A. Yes.

Q. You just don't recall; is that right?

A. That is right.

Q. Now, captain, if there were shelters that had been erected by the New York longshoremen, they could have [fol. 93] remained on the vessel coming to Boston, couldn't they?

A. Not if we tore them down.

Q. I am not asking you that. I said, if there were shelters erected by the New York longshoremen and they were not torn down by you or your crew, they could have remained on the way to Boston, couldn't they?

A. Yes.

• • • • • • •

Q. While you were in New York, captain, between January 27, 1952, and January 30, 1952, did you leave the vessel?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Did you go home to your home in Baltimore?

A. I probably did.

Q. And did you stay in Baltimore during the entire three days?

A. No.

Q. How long did you stay in Baltimore?

A. Overnight, I would say.

Q. And you returned to your ship?

A. That is right.

Q. Just a few more questions, captain. Assuming that shelters had been erected in New York, and assuming that they had been left on the vessel on its way to Boston, that would have been carelessness on the part of your shipmate, wouldn't it, captain?

A. It would be carelessness on the part of myself and the chief mate.

Q. Well, it would be essentially carelessness on the part of the chief mate, wouldn't it?

A. No, I would say that I would feel the responsibility very definitely.

Q. When you are getting ready to go to sea, captain, you don't really go on deck yourself, do you?

A. I observe what is going on on deck.

Q. My question is—just answer the question, please—do you go on deck?

A. That constitutes going on deck.

Q. Do you go on deck?

A. Surely.

• • • • • • •

[fol. 94] Q. Now, captain, it is the chief mate's responsibility, if there were shelters on this vessel, to see that they were taken down; is that correct?

A. I can't pin it down directly to the chief officer. It is all our responsibility.

Q. Well, don't you assign the responsibility to the chief officer? A. The control of the deck I assign to the chief officer, yes, sir.

Q. Doesn't the control of the deck include all these things of seeing that shelters are taken down, her hatches are properly covered, and everything else?

A. That is right.

Q. And you still say that you would assist him in that work?

A. I would oversee it, surely.

The Court: He didn't say anything of the kind. He said he would supervise it.

* * * * * * *

By Mr. Thompson:

Q. I want to find out, captain, just how sure or positive you are that there was no such shelter on your ship at the time you docked. Now, are you absolutely positive of that or do you just think that it is probable that you didn't allow such a thing to exist?

A. I'm positive.

Q. You are positive. Now, do you have any definite recollection of the condition of your ship, particularly with reference to these alleged shelters when you were docking your ship; do you have any particular recollection?

A. Of them being there or not being there?

Q. That is as to whether they were there or were not there, definitely.

A. I know they were not there.

Q. Well, now, was there anything about this voyage that stands out in your mind so that you can recall it definitely?

A. No.

[fol. 95] Q. You don't specifically recall being on the deck at any time just prior to your docking at Boston, do you?

A. I recall being on the bridge just prior to docking.

Q. Would you have a view of these shelters if they were on the deck from the bridge?

A. Yes, sir.

Q. You would. If there were any such structure as that on the deck and some loose boards on top of it, as has been described here, you have told us that in your opinion they could have survived the weather that you encountered going to Boston; is that right?

A. Yes, sir.

* * * * * * *

Q. Could the weather have loosened a tarpaulin that was on such a structure if it was on there as you were at sea going to Boston?

A. Yes.

The Court: You have testified on direct examination that you actually experienced a wind of 20 miles an hour at the time when you were traveling what you estimated to be 12 miles an hour, making a total wind force of about 30-some odd miles an hour.

The Witness: That is correct.

* * * * * * *

By Mr. Thompson:

Q. If there had been such a structure there, that could have been a case of your men placing these timbers on top of them to hold it down when it had been loosened by wind, isn't that so?

A. You mean in the ship's crew?

Q. Yes. When you were getting near Boston, with the loose tarpaulin, that some of your men might have put these pieces of timber on to hold it down; isn't that so?

A. No, I would say not.

[fol. 96] Q. You don't know whether they did it, though, do you?

A. It is so contrary to procedure, sir, that you can—that you know that they didn't.

Q. You say it was contrary to procedure to leave a structure on there——

A. Correct, absolutely.

Q. —in the first place, is that right?

A. That is right.

Q. So did you make an entry in the log about the accident?

A. I personally made no entry, sir.

Q. Did you know that someone did make an entry about the accident?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. Well, did you make any entry in the log at all on February 4th in your own handwriting? That is what I mean.

A. I don't recall having made any, sir.

Q. Look at the log and tell us whether you did make any entry on February 4th.

A. No, sir.

* * * * * * *

By the Court:

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Q. You are looking at the rough log. And your testimony is that it contains no entry by you.

A. That is right.

* * * * * * *

Redirect examination.

By Mr. Symmers:

A. Captain, can you recognize the handwriting in which the entries are made in the rough log on February 4th?

* * * * * * *

Q. There is an entry in there about the accident, isn't there, captain?

A. There might be.

Q. Will you take a look at it and read it?

A. Yes. There is an entry there.

[fol. 97] Q. Do you recognize the handwriting in which it is made?

A. No, sir.

Q. What time does the entry appear to have been made in that log?

A. It refers to 10 o'clock in the morning.

Q. What does it say? I will show you the smooth log if you think you can read it better.

A. No, I can read this.

* * * * * * *

The Witness: (Reading) "Piece of wood from winch driver's shelter (built by them) No. 1 hatch fell into No. 1 lower hold, hitting longshoreman William J. Connolly on head. Hatch tender Pat Devine. Man sent out of hold on stretcher. No ship's gear involved in any manner."

That completes the entry.

By Mr. Symmers:

Q. Can you testify whether that was put in there by one of your officers on the ship at the time?

A. That was put in by an officer.

Q. Is the log book signed by you, captain?

A. Yes, sir.

Q. When do you sign the log book?

A. When the various entries made by the various deck officers are entered in the vessel's smooth log and I sign the total of it.

Q. You sign the smooth and the rough log at that time?

A. I didn't sign the rough; I signed the smooth.

* * * * * * *

Q. Captain, it is customary, it has been testified here, not only by you but by the plaintiff's witnesses that these longshoremen do erect shelters, is that right, as you come into port?

A. That is customary.

Q. It is a common occurrence?

A. Yes, sir.

Q. How many ports do you go in and out of every year on the average; do you have any idea?

A. We make——

[fol. 98] Q. I will reframe it. About how many times do you enter and clear port? In other words, how many different times do you go into a port, not different ports but a port.

A. We make approximately a minimum of ten ports

every trip and make four round trips a year. That would be forty entrances and clearances a year, very roughly.

Q. And some ports you stay in a day, others you stay in a week?

A. Correct.

Q. When your ship is secured against the dock and the stevedores have taken over the discharge operation, what do you do? Do you stay on board the ship, as a regular practice?

A. I stay on board the ship as far as taking care of the master's responsibilities is concerned. I go ashore from time to time.

Q. What is the practice with respect to the crew? Are they held aboard ship?

A. No, sir. They are given shore leisure at all times, except when they are on duty.

Q. How about the mates?

A. The same with them, sir.

Q. Do you have relief mates sometimes from ashore that come aboard?

A. Yes, sir. That is common practice in ports.

Q. So that when the ship is in the hands of the longshoremen, you do have a custodian, namely, either yourself or one of the officers who is there, or a relief mate, is that right?

A. Yes, sir.

Q. But the cargo operations are conducted directly by the stevedoring company, is that right?

A. That is right.

Q. And the crew does not participate in those loading and discharging operations?

A. That is right.

Q. Is that the situation, so far as you can remember, on February 4, 1952, at Boston?

A. Yes, sir.

Q. Do you recall who was the officer on watch or the officer on the ship who was aboard at the time, if any?

[fol. 99] A. I recall that the man who was then third mate, Mr. O'Reilly, was on board, and I believe the chief officer was on board also.

* * * * * * *

By Mr. Greenberg:

Q. I just have one or two questions, Captain. I believe you testified that you average about forty ports during the course of the year, is that correct?

A. I said very roughly, sir.

Q. Well, that is roughly. And that would apply to the year 1952?

A. Yes.

Q. Now, roughly, of those forty ports are shelters erected in the majority of them?

A. As a rule they are erected, yes, sir.

Q. In the majority?

A. Yes.

* * * * * * *

CARL H. KERN, called as a witness on behalf of Weyerhaeuser Steamship Company, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Symmers:

Q. Mr. Kern, you are the second officer on the F. E. Weyerhaeuser?

A. That is correct.

Q. You are still employed in that capacity?

A. Yes, sir.

Q. Do you recall this voyage 18 eastbound commencing out of the west coast in December 1951 coming into New York with a cargo of lumber and then to Boston?

A. To a certain extent, yes, sir.

Q. How long have you been going to sea, Mr. Kern?

A. Well, consistently since the beginning of the second world war.

[fol. 100] Q. And did you have any sea experience prior to that?

A. Enough in the first world war.

Q. Where do you live, Mr. Kern?

A. Richmond Hill, Long Island.

Q. Are you married?

A. Yes, sir.
Q. What license do you hold?
A. Chief officer.
Q. How long have you held that?
A. About four years.
Q. That is a Coast Guard license, is it?
A. Sir?
Q. Coast Guard license?
A. Yes, sir.
Q. For chief officer?
A. Yes, sir.
Q. Now, on this voyage in December, 1951, January, 1952—you heard the captain's testimony?
A. I did.
Q. Were you aboard the ship during that voyage?
A. Yes, sir.
Q. What were your duties aboard the ship at that time?
A. The general duties of a chief officer.
Q. You were serving at that time as chief officer?
A. Yes, sir.
Q. And what does that entail in connection with work on board the ship after she leaves port?
A. The standing of a watch and the general maintenance of ship's gear and equipment and so forth on deck.
Q. Well, what is the watch you stand?
A. 4 to 8.
Q. 4 a.m. to 8 a.m.?
A. And the same at night.
Q. 4 p.m. to 8 p.m.?
A. Yes, sir.
Q. And in the interval, in between, do you have any duties?
A. Yes, sir.
Q. What are they?
A. Deck maintenance, general maintenance on deck as to the equipment.

The Court: Keep your voice up, will you please?
The Witness: Yes, sir.

[fol. 101] Q. You are the man who, in other words, carries out certain standing orders on the ship with regard to maintenance by the deck department, is that right?

A. That is correct.

Q. You also execute, and the crew, any specific orders from the captain from time to time, is that correct?

A. That is correct.

Q. In other words, you are the executive officer of the ship. I will show you this Exhibit C, the rough deck log for this voyage in question which you may use, if you have no independent recollection of the dates or times I ask you to refresh your recollection. Do you recall when the ship arrived in New York in January 1952?

A. Yes, sir.

Q. And would you describe the cargo that she had aboard?

A. The eastbound cargo was lumber.

Q. Was that all on the deck or also under deck?

A. Both on deck and under deck.

Q. Do you recall the stowage of that deck lumber cargo in a general way, or specifically?

A. Well, your holds are fully loaded.

Q. You have to answer that yes or no, I think. Do you recall it?

A. Yes, sir.

Q. Was there any general difference between the way that deck cargo was loaded and any other deck cargo you generally carry from the west coast, to your recollection?

A. The only difference is that sometimes you have a little more or less. I can't recall the exact amount that is on your decks.

The Court: No. But the manner of stowage, was the manner of stowage the same as it customarily is?

The Witness: Yes, sir.

[fol. 102] Q. Chief, is the manner of stowage such that in longshoremen's temporary shelter between two winches of No. 1 hold could remain there despite a normal deck load of cargo?

A. With a deck load it couldn't be there.

Q. Can you swear as to whether or not there was a longshoremen shelter or three or four longshoremen shelters on that ship?

A. At what time?

Q. At the time she arrived in New York from Longview.

A. That couldn't be. There were none.

* * * * * * *

Q. Mr. Kern, I think we were on the ship coming into New York and you had just finished testifying that when she came to New York she had a deck load of lumber.

A. That is correct.

Q. And at that time there were no shelters, longshoremen shelters, on the ship; is that correct?

A. Correct.

Q. I show you Defendant's Exhibit C, chief officer's logbook, so that you may, if you wish, refresh your recollection.

Do you recall the deck cargo was discharged at New York, Greenpoint?

A. The definite load at that time?

Q. The deck cargo. When you arrived in New York and docked at Greenpoint.

A. We did have deck cargo, yes, sir.

Q. And it was discharged in New York?

A. Yes, sir.

Q. By the Nacirema Operating Company?

A. Correct.

Q. And on January 30th you sailed for Boston, is that correct?

A. Correct.

Q. Now will you tell us, if you can, what you did from the time the ship left the dock until she was considered ready for sea en route to Boston?

A. From the time she left the dock, you say?

[fol. 103] Q. Yes. Well, tell us this: When you are ready to leave the dock, what is your practice, what did you do on this occasion, if you know?

A. Well, you get your bosun and get him to secure all the gear in preparation for going.

By the Court:

Q. Did you do that on this occasion?

A. Yes, sir; at all times.

Q. Well, you did at this time?

A. Yes, sir.

Q. What you did at some other time is not so important as what you did on this time. So will you tell us, as well as you can, what you did at the time you cleared the dock at Brooklyn on your way to Boston.

A. At 5.57, when that ship left the dock, you have your men fore and aft letting go of the ship.

By Mr. Symmers:

Q. That is, members of the crew?

A. Correct.

Q. How many men in the deck department of your crew?

A. 11.

Q. Are they all turned out at this time?

A. Yes, sir.

Q. Then what do they do?

A. So many men are foreward and so many men are aft, one man is at the wheel on the bridge.

Q. Are they operating under your general instructions or orders?

A. Yes, sir.

Q. Do you have any recollection of when they finished their work on this occasion?

A. (Referring to book) 6.05 a.m.

Q. Now that would be between the 4 to 8 watch, is that right?

A. Correct.

Q. And at that time you were on watch, in addition to being chief mate?

A. Correct.

[fol. 104] Q. Then you came on watch again the next afternoon at 4 o'clock?

A. 4 in the afternoon, yes, sir.

Q. Do you recall on this occasion, specifically, whether there were any longshoremen's shelters on this ship when you left Brooklyn?

A. Evidently, I couldn't swear to it.

* * * * * * *

Q. You were on watch again the next morning, were you, or, rather, that afternoon, at 4 o'clock?

A. The same afternoon at 4 p.m., yes, sir.

Q. En route to Boston?

A. Correct.

Q. At that time do you recall whether there were any winchman's shelters on the ship?

A. I couldn't be positive of it at that time.

Q. Do you recall whether there was any winchman's shelter on the ship when she arrived at Boston?

A. They were not.

Q. Are you positive of that?

A. Positive.

Q. Is it part of your duty aboard the ship to make an inspection of the decks every day?

A. Yes, sir.

Q. Is that what you did on this occasion?

A. Yes, sir.

Q. Have you ever failed to make a daily inspection of the decks?

A. No, sir.

Q. How many years have you been going to sea?

A. When the Second World War started, at that time right to the present date.

The Court: That was around September, 1939, when it started.

The Witness: That is the time.

Q. About 15 years?

A. Yes, sir.

Q. In your experience have you ever, to your recollection, been on a ship where these longshoremen's-winch-[fol. 105] men's shelters were permitted to stay up during the course of the voyage?

A. No, sir.

Q. Or from port to port?

A. No, sir.

* * * * * * *

Q. You have heard the testimony, Mr. Kern, of three Boston longshoremen who testified that when your ship came into port there were four structures over the hatches,

over four of the hatches on your ship, that is between the winches and four of the hatches on your ship. Is that a fact?

A. No, sir.

Q. Do you deny it?

A. Absolutely.

Q. Mr. Kern, in your experience, if there had been a structure built over the No. 1—or between the No. 1 hatch winches, such as has been described here in court, of which this Plaintiff's Exhibit 5 (indicating) represents a rough model, with the piece of tarpaulin lying loosely over the top and three pieces of board approximately 1 inch by 8 inches by 3 by 4 feet lying on top, without nails—if that structure had existed from the time you left New York, would you consider it possible, in your experience as a seaman, under the weather conditions and the wind conditions and the speed prevailing on that voyage from New York to Boston, for that top tarpaulin to have remained there?

A. In my opinion it could not.

Q. Now you say that it is the customary or frequent practice for longshoremen to build these structures?

A. That is correct.

Q. Does the ship furnish as a matter of practice or custom the tarpaulin for these structures?

A. We supply nothing for them.

Q. Are you familiar with the custom of where longshoremen obtain tarpaulins at the Port of New York, that is, the Nacirema Operating Company longshoremen?

A. No, sir.

[fol. 106] Q. Have you ever seen them bring tarpaulins aboard ship at New York?

A. I have not noticed them, no, sir.

Q. How about Boston? Have you ever seen them bring tarpaulins aboard the ship?

A. I have not taken notice of it, no, sir.

Q. Do you keep a supply of tarpaulins on the ship for the longshoremen?

A. No, sir.

* * * * * * *

Cross examination.

By Mr. Greenberg:

* * * * * * *

Q. Now, Mr. Kern, you have testified here that you have the responsibility of seeing that the deck, when the vessel leaves port, that the deck is in proper shape; am I right?

A. That is correct.

Q. Will you briefly tell us what that consists of doing?

A. In the first place, you have a gangway; you have booms; you have the deck dunnage laying around, things like that; tarpaulins to be secured on the hatches so they don't blow off, things like that. All those things are in the general setup of securing ship.

Q. That is your responsibility?

A. That is.

Q. Now, actually, that responsibility you delegate to a bosun?

A. That is correct.

Q. Many times you don't even go on deck, do you?

A. I do. That is part of my job.

Q. Do you want to leave it that you go on deck every time that you leave port to see if the bosun is performing his work properly?

* * * * * * *

A. When a ship would sail, like in this case here, five in the morning, my responsibility, after the ship sails, is to be on the bridge until 8 a.m., then I go on deck.

[fol. 107] Q. In this particular case your responsibility was on the bridge?

A. After we had cleared the dock.

Q. And that was about 5 a.m. to about 8 a.m.?

A. Something like that. (Refers to book). From 6.05 the ship was undocked up to 8 o'clock after we are clear the dock, then the bridge responsibility is mine.

Q. Where is the captain during this time?

A. On the bridge.

* * * * * * *

Q. Well; isn't the most important thing when you are leaving port, Mr. Kern, the navigation of the vessel?

A. And that the ship is shipshape.

* * * * * * *

By the Court:

Q. Are there several things that are important when a ship is moving in the water; is it important, for instance, that the navigation be accurate?

A. Sir?

Q. Is it important that the navigation be accurate?

A. Yes, sir.

Q. Is it important that the engineroom crew be doing its job properly?

A. Yes, sir.

Q. Is it important that whatever is on deck be so secured that it may not be tossed around?

A. Correct.

Q. Are you able, as a result of your fifteen years' experience, to assess the relative importance of one of those things from another, or would you say that they are equally important in their own sphere?

A. They all are important for the safe navigation of a ship.

* * * * * * *

Q. Now, Mr. Kern, this lumber that you have testified to that was on the vessel when it reached New York was taken off, is that correct, by the New York longshoremen?

A. That is correct.

[fol. 108] Q. And the winches were operated to take off the lumber, is that correct?

A. That is correct.

Q. Now there had to be some space there, I take it, for the longshoremen to operate the winch?

A. That is correct.

* * * * * * *

Q. To the unloading of the lumber, you don't actually know what happened there, do you? Did you observe them unload the lumber?

A. Absolutely.

Q. You stayed on the ship and watched them unload the lumber?

A. During daylight hours I am on there 8 to 5.

* * * * * * *

By Mr. Greenberg:

Q. There was nothing to have prevented these New York longshoremen, after they took off a section of that deck cargo after No. 1 hold, there was nothing to prevent them from erecting a shelter, was there?

A. No, sir.

Q. They could have erected a shelter?

A. They could have.

Q. I want to be fair here, Mr. Kern. As I understand your testimony, these are your exact words, and if I am wrong, you correct me, your testimony is that, when you were asked by Mr. Symmers about the shelter aft of No. 1 hold, you said: Evidently I couldn't swear to if that they were there or they weren't there while the vessel was in New York.

Was that your testimony?

A. That is correct.

* * * * * * *

Q. Well, the question was—I may not have phrased it right—the question was: You testified: Evidently I couldn't swear to it that there were hatches on the vessel; I am asking you what date you were referring to when you responded to that question, what day or what time?

[fol. 109] A. At any time after the deck load was partially or altogether removed.

Q. In other words, you don't know whether there was a shelter there or there wasn't a shelter there?

A. There were none there when the deck load was on complete and we docked. What they put up, when they put anything up after that I wouldn't testify.

Q. But you are positive that when the vessel reached Boston there were no shelters on there?

A. Absolutely positive.

Q. Now, Mr. Kern, if there were shelters on when the vessel reached Boston, actually that would mean that you would have been derelict in your duty?

A. I wouldn't be working any more.

Q. Isn't that what it amounts to, that your job is to see that these shelters are taken down; is that correct?

A. That is correct.

Q. And if they were on when the vessel reached Boston, it would have meant that you were derelict in your duty?

A. Correct.

Q. Now you didn't see the accident that occurred to Mr. Connolly on February 4, 1952?

A. I did not.

Q. And what was the first time after that that you became aware of the accident?

A. Shortly after it happened.

Q. How soon afterwards?

A. I would say within twenty minutes, or something like that.

Q. You knew there was an accident?

A. Yes, sir.

Q. And where were you at the time?

A. That I couldn't tell you exactly. Some part of the deck or ship, I don't know; I couldn't recall it.

* * * * * * *

Q. I think you have heard Captain Hyatt testify, and I think you will agree, that you probably go to about 40 ports during the course of a year?

A. That is correct.

[fol. 110] Q. During the arrival and the departure from these 40 ports at about how many, would you say, do the longshoremen construct shelters?

A. How many of the ports?

Q. Yes.

A. Possibly all of them. Not—nothing definite on that.

Mr. Greenberg: I think that is all.

Cross examination.

By Mr. Thompson:

* * * * * * *

Q. All right. Now, when you got to Brooklyn on this voyage, that is the first place that you discharged the lumber; is that correct?

A. That is correct.

Q. And your full load, I think, was taken on on the West Coast?

A. That is correct.

Q. At that time, when you took on the load, the winches had to be operated in taking on the loan; is that correct?

A. That is correct.

Q. The same equipment that was being used to unload it had to be used to load it, is that right?

A. The what?

Q. The same equipment that was being used to unload it at Brooklyn and also at Boston, was the same equipment that you used when you loaded the vessel, is that right?

A. Yes, sir.

Q. Do you know whether they had a deckhouse, these longshoremen on the West Coast had a deckhouse when they were operating the winches and loading?

The Court: By deckhouse, do you mean the shelter such as we have been talking about?

Mr. Thompson: That is right.

The Court: Or do you mean by those words some other structure?

[fol. 111] Mr. Thompson: I mean a deck shelter, a shelter like over the winches and what we are talking about.

The Witness: At the loading you are talking about.

Q. At the time that the boat—at any time while the boat was being loaded on the West Coast did the longshoremen at any time have a shelter?

A. They may have.

Q. You don't recall whether they did or not?

A. I cannot recall, no, sir.

Q. When they got to Brooklyn to unload this, they used the same winches for unloading?

A. That is correct.

Q. You have testified, I believe, already that you don't know whether or not they erected a deckhouse, I mean a shelter—I am sorry about calling it a deckhouse; a shelter; you have already said you didn't recall whether they did.

A. Whether they did have them on the West Coast loading.

Q. You don't recall whether they erected one at Brooklyn, either, do you?

A. That I don't know.

Q. Therefore, if you don't recall whether they erected one in Brooklyn, you don't recall, after the boat left Brooklyn, whether you removed any such thing as that, do you?

A. I know positively that there were none on when we were coming into port.

Q. Will you tell us if there is anything that you can recollect which makes you so positive and swear so positive that that is a fact?

A. Because in every port and every time coming into port, that isn't ship's gear, and those things, whatever they may have erected, whenever, when we leave to go out to sea, or leave the port, they are taken down; and if I saw one at sea, it would be immediately removed or the bosun would be informed to remove it.

* * * * * * *

[fol. 112] Redirect examination.

By Mr. Symmers:

Q. Can you tell, from looking at the logbook, Mr. Kern, what the weather was during the three, four or five day period the ship was in Boston up to and including the morning of February 4 '52, from the date of arrival?

A. The day of arrival in Boston?

Q. Yes. What was the weather on the day of arrival? Can you tell from looking at the logbook first?

A. Yes.

Q. Will you please look and tell us.

A. (Witness refers to logbook). Day of arrival it was southwesterly, force 3 in the afternoon.

Q. Any rain?

A. No, sir.

Q. How about the next day?

A. In the morning, southwesterly, force 3; in the afternoon westerly, force 2 and 3.

Q. And any rain—that is the 1st of February?

A. That is the 1st of February.

Q. Was there any rain on the 1st of February, according to your logbook?

A. No, sir.

Q. Now how about the 2nd of February?

A. On the morning of the 2nd, westerly winds, force 3 and 2, with rain and light rain.

Q. Does it tell you there in that logbook what hours it rained?

A. It shows rain at 4 a.m., it showed rain at 8 a.m., and 12 noon a light rain.

Q. Was there anybody working the ship from 4 a. m. to 8 a. m. with the cargo, operating stevedores?

A. 4 a. m. to 8 a. m. no stevedores worked.

Q. From 8 a. m. to 12 noon you have rain, you say?

A. Yes, sir.

Q. That was what date?

A. On February 2nd.

Q. Three days after you reached Boston; right?

A. Correct.

Q. And was there any rain on the 3rd?

A. No, sir.

[fol. 113] Q. Was there any rain on the 4th?

A. Drizzle and raining at 4 a.m., raining at 8 a.m., raining at 12 noon.

Q. And when did the stevedores come aboard ship on the 4th?

A. 8 a. m.

Q. What was the force of the wind on the 4th, the morning of the 4th? Does that show in the logbook?

A. Southerly force 2.

Q. How many miles an hour is that?

A. Roughly, 10.

Q. Now, Mate, you say that when the ship is in port and there are discharging operations going on, you yourself are on duty from 8 a. m. to 5 p. m.?

A. That is correct.

Q. And, in addition, there is a second mate and a third mate?

A. Correct.

Q. Now as first mate, or, you as first mate, or do any of

your officers under you supervise the stevedores, the longshoremen, tell them how to work?

A. No, sir.

Q. Have you ever instructed them in how to build a shelter?

A. No, sir.

* * * * * * *

Q. In other words, the stevedoring operations are independent of your duties; is that true?

A. To a certain extent, yes.

Q. Now to what extent are they not independent?

A. If I see something that wasn't being properly loaded or properly stowed I would refer it to the stevedore loading boss in reference to it.

Q. In the course of loading the ship you have to see that she is going to be loaded in a seaworthy manner for the safety of the ship and cargo?

A. Correct.

Q. In the discharging of the ship you have a responsibility to the owner of the cargo that it is not going to be dropped overboard?

A. Correct.

The Court: Is it also your responsibility at any time when you were on duty to see that the ship is kept seaworthy?

[fol. 114] The Witness: Correct.

The Court: That remains at all times.

The Witness: At all times.

Q. When you say, Mr. Kern, that you keep the ship seaworthy, what do you refer to, the ship itself and her gear?

A. Yes, sir.

Q. And the equipment that you turn over to the longshoremen?

A. Correct, sir.

Q. That is the winches and the falls and the blocks and the nets, if any?

A. Yes, sir.

Q. And these winchmen's shelters, are they furnished by the ship?

A. Absolutely not.
Q. Are they part of the ship?
A. No, sir.
Q. Are they part of the ship's equipment?
A. No, sir.
Q. Have you ever asked a winchman not to erect one of these?
A. I have at times.
Q. Have they ever told you anything in response to your request?
A. Yes, sir.

* * * * * * *

WILLIAM V. BELL, called as a witness on behalf of Weyerhaeuser Steamship Company, being first duly sworn, testified as follows:

Direct examination.

By Mr. Symmers:

Q. Mr. Bell, how old are you, sir?
A. 54.
Q. Are you married?
A. Yes, sir.
Q. Where do you live?
A. 40 West Walnut Park, Jamaica Plains, Massachusetts.

* * * * * * *

Q. By whom are you employed, Mr. Bell?
A. Nacirema Operating Company, Boston.
Q. At Boston?
A. Yes, sir.
Q. What is the nature of your job, the title of your job?
A. I am a timekeeper.
[fol. 115] Q. Will you tell us what a timekeeper does.
A. Well, he assists the hiring boss or the stevedore picking up the gangs and getting the gangs' or the individual members' Social Security numbers, running a log of the cargo being loaded or discharged, whatever the case may be, making out payrolls and payments.

Q. In other words, you are the clerical man who keeps track of the gangs and who they are, their Social Security numbers, sees that their payrolls are in order, and that sort of thing; is that right?

A. Yes, sir.

* * * * * * *

Q. Were you present when the F. E. Weyerhaeuser came into Boston on January 31, 1952, four days before Mr. Connolly was injured?

A. Yes, sir, I was.

* * * * * * *

Q. Mr. Bell, that lumber terminal at Boston, where the F. E. Weyerhaeuser was docked at the time of Mr. Connolly's accident, to your knowledge does the Nacirema Operating Company maintain a locker or some space where they keep gear and equipment?

A. Yes, sir.

Q. And do they keep tarpaulins for the longshoremen to use when they erect these hatch shelters?

A. Yes. They have small torn-up——

Q. And when the discharging operation is finished, do you know the custom or practice of the longshoremen with respect to that tarpaulin?

The Court: You mean longshoremen in Boston?

Mr. Symmers: In Boston.

A. Yes, sir, I do.

Q. What is that?

A. Some of them have their own, some of them put it back in the gear locker for future use.

Q. In each case they take them off the ship, is that right?

A. Yes.

* * * * * * *

[fol. 116] CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury: We are coming to the part of the case where it is put in your hands and you will determine the issues of fact here, but

before we do that it is my duty to give you some instructions on the law which you must apply to the facts as you find them and some rules that you are to apply in making those findings of fact.

Now, as it has been pointed out to you at the beginning of the case and in summations of counsel, there are really two lawsuits going on here; one is by the plaintiff Mr. Connolly against the Weyerhaeuser Steamship Company and the second one is a suit by the Weyerhaeuser Steamship Company against the Nacirema Operating Company, which was the stevedoring company which did the loading on this day in Boston when the accident occurred. There are principles that apply in one case which do not necessarily apply in the other, so I think the intelligent thing to do is to submit to you each of these cases separately, therefore I shall ask you to go out and consider the claims of Mr. Connolly against the Weyerhaeuser Steamship Company first and then when you come back with your verdict on that I shall ask you to retire again and consider the issues in the second suit, namely Weyerhaeuser Steamship Company against the Nacirema Operating Company, and before I submit that second one to you I shall give you some instructions which apply peculiarly to that.

As to the cause of action or the lawsuit brought by Mr. Connolly against the Weyerhaeuser Steamship Company, Mr. Connolly has asserted two causes of action, as lawyers call them but they are two claims. He says that he was injured on the 4th of February 1952, up in Boston on this ship. In his first claim he says he was injured because of the negligence of the ship, and in the second cause of action he says he was injured because the ship was unseaworthy. [fol. 117] Now, bear in mind that Mr. Connolly is not suing the Nacirema Operating Company, the stevedores who were his employer; the suit against them is the second suit that I mentioned, the suit by the steamship company against Nacirema. Mr. Connolly's claim is against the ship.

First he says that his accident, his injury was caused by some negligence on the part of this ship and that negligence, he asserts, arises from this set of facts which he offers to you: He says that when that ship came in on the morning of January 30th, I think it was, there were

some shelters erected on the ship and, particularly, that there was one substantially along the line of this rough model that has been before us here, and that it was over that place between the two winches just aft of the No. 1 hatch, that it was up there when it came in and that it was in the same form that it was on the 4th of February when he was hurt, namely, that it was a structure made of some lumber covered over by one piece of tarpaulin on top of which another piece of tarpaulin was placed. The under tarpaulin, as I recall the testimony, was that it was lashed fast or fastened to the lumber and the top piece of tarpaulin was not fastened but was held down by three pieces of board which, as I recall the testimony, were about four or five feet long, eight inches wide and about an inch thick.

He says that some time on the morning of the 4th, while he was working there, one of those pieces of wood that was lying unfastened on the top of this second piece of tarpaulin came off the top of that shelter in some way and fell down into the hold and struck him on the head, causing the injuries which you have heard testified about and the resultant condition from those injuries. He says that occurred because of the negligence of the ship in allowing that kind of structure to be there and that piece of wood falling on him.

[fol. 118] Now, negligence is the doing of something which under all the circumstances a reasonably prudent person familiar with those circumstances would not do under those circumstances, or it may be the failure to do something which a reasonably prudent informed person would do in those circumstances, that is, some step that they would take.

Now, if you find from the evidence that the structure, that is, this shelter, was on the ship when it came into Boston Harbor and that the ship offered it to the stevedores to use and work with, and if you find that in permitting that to be there the ship was guilty of some act of negligence as I have defined it to you, then you could find a verdict for Mr. Connolly. But if you find that the shelter was not on that ship as he claims, or if you find that the accident did not happen as he claims it happened, then on this issue of negligence you would have to bring in a verdict for the ship.

Bear in mind on the question of the cause of action based on negligence that Connolly's claim is definite: The structure was there, the loose tarpaulin on the top, the boards lying on top of the tarpaulin and one of them in some way fell on him. If you find, for instance, that the first step is not true, that the shelter was not there at that time, then Connolly has failed to sustain his burden in that case.

Now, what do I mean by sustaining a burden? In a civil case, which this is, the burden is on the plaintiff to prove his claim by a preponderance of the credible evidence, and if he fails to prove one of the main factors in his assertion of his claim then he fails to prove it. If, on the other hand, you find that the structure was there and that in leaving it there, making it available to these men to work, that the ship was guilty of some act of omission or commis-
[fol. 119] sion which act of omission or act of commission was negligent and that brought about the injury, then you might find a verdict for Mr. Connolly on the first cause of action.

Now, on the second cause of action you have different considerations and different standards of measurement. Mr. Connolly, a longshoreman working on that ship, and this is a matter of law which you must take from me, became assimilated to the status of a seaman, a sailor on board the ship. And it is the law, which you must take from me, that the ship owed to Mr. Connolly a duty to furnish a seaworthy ship for him to work in. Now, by seaworthiness is meant that the ship, its appurtenances, its gear were sound and fit for the functions for which they were furnished. There is no question, when we consider seaworthiness, as to whether or not there was any negligence; if the actual condition of the ship involved here, at the time Mr. Connolly was working on it in that hatch, or if that area in which he was working was in fact unseaworthy, and by that I mean if the fact was that its gear and equipment and its fittings were not sound and appropriate for the work that they were being used for, then whether that fact, that condition of unseaworthiness came about through negligence or otherwise is not important, because if the ship is unseaworthy the duty is absolute, and it makes no differ-

ence whether anybody knew about it and had an opportunity to correct it.

Going back for a minute to the negligence, in order to find negligence against the ship you would have to find, for instance, that they had an opportunity to see that structure, that they did see it and that they took no steps to make it fast and to keep that wood down there. But on the issue of seaworthiness, if the condition actually occurred, of unseaworthiness, it makes no difference whether they knew [fol. 120] anything about it or not or had any opportunity to correct it—they owed him that duty.

Now, I have said that seaworthiness means that the gear and the ship itself and its appurtenances must be fit for the job that they are used for. Whether or not this shelter constitutes one of those fittings is for you to determine and to find from all the facts whether that was an appurtenance of the ship and whether or not its condition rendered the ship unseaworthy.

Now, I say that those are matters that you have to pass upon based upon the evidence. Counsel in their summations have talked to you about the evidence and I have referred to items of it here while I was giving you this little instruction, but you are not bound to accept anything that I say as testimony or anything that counsel said. You are the sole judges of the facts, you are the sole judges of the credibility of the witnesses and you are the sole judges of the weight to be given to any piece of evidence.

Now, I say you are the sole judges of the facts and that it is your duty to ascertain what the facts are. Now, finding facts may sound like a rather mysterious process, but, of course, it is not; we are all doing it all the time in our life, every day we are doing it. It simply means that you consider all the evidence which you recall and that you draw from that such inferences of fact as the evidence in your judgment will rationally support and on the basis of that you attempt to find out what the truth is in this case. I might draw one inference from a set of facts and somebody else might draw another. It does not have to affect you at all. You draw the inferences that you think are the appropriate inferences to draw from the facts.

I said that you are the judges of the credibility of the

witnesses. That is something that you are doing all the [fol. 121] time in your ordinary affairs of life also. The word "credibility," for instance, is only another word for believability, as I am sure you all realize. And every day I suppose each of us is doing something, taking some position, arriving at some conclusion on the word of some other person or persons. We do it either because we believe the person or because we do not believe him. Credibility, as I say, is only believability. Now, when you are determining the credibility of a witness or of anybody that you might be talking to in your ordinary affairs, there are certain considerations which I think you would take into consideration and probably do. First of all, did the persons talking to you (the witnesses in this case) strike you as persons who were frank and honest in their testimony here?

Second, do they have any interest to be served by getting you to accept the truth of what they told you?

Did they appear to you to be persons who had good powers of observation, good powers of recollection?

Is what they told you credible in the light of all the other testimony in the case that you believe, and is what they tell you credible in the light of your own normal experiences in life?

These are some things that you might take into consideration. It may be that you have other tests that in your ordinary affairs you use in attempting to weigh the credibility of some person that is talking to you. It is whatever you use in your own ordinary affairs that you use here because the test, after all, is one of common sense and experience.

Now, I say you are also the judges of the weight of the evidence. We use the analogy of weighing in a scale because it is thought to be a handy means of illustrating an abstract idea. But weight of evidence has nothing at [fol. 122] all to do with the number of witnesses or the length of time they were on the stand or the number of exhibits. The weight of the evidence is merely the power of any evidence to persuade you of the truth of the proposition in support of which it is offered. You probably have had occasions where you have said, "X is a man whose word I believe against all the world." Or you might say "That

proposition is so silly I would not care if all the people from the year one until now swore to it, I just don't believe it is true." So the number of witnesses and the length of time they were on the stand hasn't anything at all to do with it; it is the power of that testimony to persuade you of the truth.

Now, we say the plaintiff has the burden to prove his cause of action by a preponderance of the credibile evidence. If you can assume something like a chemist's scale with two pans and you put all the evidence that you believe that supports the plaintiff's claim in one pan and all the evidence which is contrary on the other and if after you have done that the scales are in even balance, then obviously the plaintiff would not have sustained his burden because it must preponderate in his favor in order for him to prevail. If it tips on his side of course obviously he has sustained his burden. If it tips against him, obviously he has not. That question of what weight is to be given to the evidence and whether or not there is a preponderance in favor of the plaintiff is for you ladies and gentlemen to decide.

You are required, then, to bring in a verdict on each of these causes of action, first this action for negligence, this cause for negligence, and second this cause for unseaworthiness. The form of your verdict would be for the plaintiff on the first cause of action or for the defendant on the first cause of action, that is, the negligence action. [fol. 123] On the second cause of action, which is based on unseaworthiness, it would be the same—either for or against, for the plaintiff or for the defendant.

But, of course, before you can get around to that you have got to get into this question of damages if you find that the plaintiff is entitled on either cause of action to damages. Now, that does not mean that you give one set of damages on the first cause of action and another set of damages on the second cause of action. Assume that you should find for the plaintiff, and this is merely by way of example, because, if you find for the defendant on both the causes of action the plaintiff would not be getting anything, but you may find for the plaintiff on one cause of action and against the plaintiff on the other cause of action, or you may find for him on both or you may find

against him on both. But if you get to the question of considering damages your problem there would be to ascertain what in dollars and cents Mr. Connolly ought to receive for what happened to him.

Now, if you should find that he prevailed on either cause of action you would have to take into consideration, first of all, the actual expenses that he had. As I recall the testimony (and bear in mind your recollection is what counts and not mine), and I do not think there was any dispute about it, he had doctors' and hospital bills amounting to about $800 and then he had loss of wages for two years, since the date of the accident up until now, and I think that was estimated at about $11,000, roughly $5,500. It is for you to determine from the evidence what his lost wages were, if he lost any. That is what we call special damages, the loss of wages, that $800 for his doctors' and hospital bills, and then the actual loss of wages from the time of the accident up until now. Then, of course, Mr. Connolly has testified that he is not able to work, and [fol. 124] the doctor that was called testified that he thought he would not be able to work. Of course, the doctor's testimony is for you to weigh and assess and evaluate just as much as the testimony of anybody else. The doctor came here as an expert and he gave us his opinion, as he is entitled to. But an expert witness is to be tested by these various tests that I have suggested, just the same as any other witness. You can accept his testimony or you may reject it, and you are required to give it only such weight as you think it deserves under all the circumstances of the case as you recall them.

But there was testimony that it would require about $60,000, a capital fund, now, of about $60,000 in order to provide Mr. Connolly with his present rate of earnings for the next 14 years. 14 years is a figure which is given to you for your guidance. It is for you to determine whether or not Mr. Connolly is likely to have 14 more years of life or whether in your judgment he is not likely to have that. I do not know any test by which you can do that, but it is your job to do it and I leave it with you to do it.

It is also for you to determine whether or not Mr

Connolly, who is now 60 years of age, would be able to continue to do the kind of work the doing of which in the past has earned him this $5,500. You are free to, and you may, conclude that a man of that age, now 60, would not be able to continue at this kind of work and to earn this kind of money for the rest of the time. You might say that he could do it for two years or five years, or three years or seven years, and for the rest of the time he would only be able to earn something less than that, or you would be perfectly free to find, if the evidence in your opinion justifies such a finding, that he could do it [fol. 125] for the rest of his expectancy. The expectancy table is something given to you as a guide and not something that you must necessarily accept. It is for you to determine what he would need in order to get whatever earnings you think he would be capable for as many years as he would be around to earn it.

Then, also, if you find that he is entitled to anything, you would be entitled to take into consideration what amount in dollars and cents would compensate him for whatever pain and suffering you find he has sustained. I have never yet found a formula by which I could advise a jury to translate pain and suffering into dollars and cents, and I shan't attempt to do it with you ladies and gentlemen. That is a problem that is exclusively with you. You have heard the testimony. You have heard what the nature of the operations was, you have heard Mr. Connolly's testimony as to his present condition, and it is for you to say, under all the circumstances, if you find he is entitled to anything, what would compensate him for such pain and suffering as he has sustained.

Now, I think I omitted to say to you in connection with this question of credibility that the fact that a person has an interest in the outcome of a case I suggested to you was one of the factors that you may take into consideration in assessing the believability of his testimony. Now, as must be perfectly obvious to any mature person, the fact that a man has an interest in the outcome of an issue or a dispute does not necessarily mean that he will lie about it in order to further his interest, but of course he might; but even if he does not lie there is always the possibility that a man

whose interest is to be served by getting you to believe his testimony may, even unconsciously, color his testimony in a way that will be more helpful to his own interest than otherwise. It is for you to say whether or not any witness [fol. 126] here has done that. It might cause him to have a sharper recollection of the facts in a way that would help him rather than one that would hurt him. Those are all matters for you to take into consideration.

But if you find that any witness here has lied you are perfectly at liberty to disregard everything the witness told you, or you may disregard only so much as you think was false and you may accept any part of that witness' testimony that you think was true. That all goes to this question of credibility, which is your exclusive province.

Now, there is one thing that you must be very careful about, I think, in this case. There is no dispute here by anybody that this man was injured, nobody disputes that the injury was quite serious. The only issue before you here is this hard, cold, legal issue of liability, and you must judge it on the facts and in accordance with these instructions that I have given you. Sympathy should play no part in that consideration at all. I do not mean in any sense to be unfair to anybody, but this is a proceeding where you are asked to determine who is responsible, and sympathy or prejudice should play no part in your consideration.

When you go into the jury room you should discuss the matters among yourselves. It is the essence of the jury system that everybody listen to the views of his fellow jurors. It is not a poll taking proposition at all, where each one says, "I think this," and that is the end of it. Each of you ought to be listening to the views of the others with an open mind, willing to listen to those views and to accept them if the reasons offered by your fellow juror in support of his views are persuasive. However, if after considering all the testimony and in the light of these instructions and listening to your fellow jurors views, any juror comes to a firm, honestly arrived at point of view, he should never [fol. 127] yield that merely for the sake of agreement or merely for the sake of conformity. Each of you has an individual duty and you should observe it, as I am sure you will, in accordance with your oath.

Now, that concludes my instructions to you on the first suit here, that is, the claim of Mr. Connolly against the ship.

Now, it may be, and it usually happens, that the lawyers think the Judge has made some mistake here, or that he has failed to call to the jury's attention something which they think is important, and I shall now ask you if you have anything that you wish me to say in addition to what I have said.

Mr. Greenberg: Your Honor, the only part I had was that——

The Court: I do not know how they do it in Massachusetts because I practiced law in New York, and our custom is to object to the charge or to ask that it be corrected in some way. Do you object to the charge?

Mr. Greenberg: No, I do not object, except I would like to have the Court clarify one issue, that is all, and that is on your Honor's charge with respect to both the cause of action of unseaworthiness and negligence. I would like the jury to understand that actually, in the event that they should find for the plaintiff and for these two, the plaintiff actually makes only one recovery. I mean, that he does not get two recoveries on it.

The Court: Well, I thought I made that plain to the jury, that he would get only one recovery and that that would be the end of it. And I notice the jurors nodding their heads, indicating that they are quite aware of it.

Mr. Greenberg: I am sorry.

The Court: Otherwise, you have no exceptions to the charge?

[fol. 128] Mr. Greenberg: No, sir.

The Court: Mr. Symmers, do you have any exceptions?

Mr. Symmers: Your Honor please, I do think we have some requests to charge that we might refer to your Honor by number. But in the course of your charge you refer to the——

The Court: Do you have those requests here? I don't know whether I brought them down with me or not. I am afraid I did not.

Would you be kind enough to wait until I have my clerk go up and get them?

Mr. Symmers: I am not referring to those at the moment. In the course of your charge you referred to the first and second causes of action, which, of course, and I think the jury understand, means the first and second causes of action of this plaintiff Connolly against the Weyerhaeuser as distinguished from what we have heretofore referred to as the first suit and the second suit——

The Court: I got the impression, watching the faces of the jurors, that they were quite aware of that and that we were discussing only the claim of Mr. Connolly against the ship and that as between the ship and Nacimera Operating Company for the time being it is out of our minds completely.

Mr. Symmers: Then, if your Honor please, with reference to your instructions regarding unseaworthiness of the ship, its gear, equipment and appurtenances, I would suggest perhaps it might be possible to define for the benefit of the jury, those of the jury who are not familar with ships, what appurtenances and gear and equipment of the ship are.

The Court: Will you suggest one?

Mr. Symmers: Yes, your Honor; I think I can. The gear and equipment of the ship, the lifeboats, the winches, [fol. 129] the booms, the masts, the tackle that is furnished by the ship to the stevedores, all those parts of the ship which are on the ship when she is in the course of a voyage or which are necessary to her winches in port, as distinguished from gear or equipment brought aboard the ship by and for the convenience of the longshoremen.

The Court: Have you included appurtenances in that? I understood you to say that was gear and fittings you were describing.

Mr. Symmers: Appurtenances I think is about the same thing, your Honor, something that appertains to and is part of the ship.

The Court: I left it to the jury to say whether under the testimony here as to custom with respect to loading and unloading ships a shelter over the winchmen was an appurtenance of the ship, and I shall not withdraw that question from them. It is perfectly——

Mr. Symmers: No, I didn't except to that, your Honor. I

just wanted them to have them understand what the appurtenance was.

The Court: About what?

Mr. Symmers: What an appurtenance was.

The Court: You haven't clarified it to me but maybe you have to the jury, and I will leave it that way.

Mr. Symmers: I said it was something that——

The Court: If the jury can find under those instructions, and I repeat it again, they could find, if they thought the evidence justified it, an unseaworthy condition—now I will stop. Are you fellows going to listen to me now? It is quite all right; don't apologize at all. I used to be down at that table, too, and I know you have to talk to one another, and that is all right, except that I don't want to say something here which might be harmful to your cause and [fol. 130] you would miss the opportunity to call my attention to the error.

The jury may find whether or not that was an appurtenance, whether or not the condition which they find it to have been in did or did not bring about an unseaworthy condition, or constituted an unseaworthy condition.

All right, now, ladies and gentlemen.

Mr. Thompson: If your Honor please——

The Court: Yes?

Mr. Thompson: I ask your Honor to tell the jury in connection with the charge—you said that after they consider the first case you would charge them on the second case; I ask your Honor to tell the jury that if there is a verdict in favor of the steamship company that is the end of the case and there will be no consideration of any further case.

The Court: I thought I made that clear, but if I didn't you have said it again. You see, I have an idea that when people are paying attention and when you say something to them once, that that is enough. But there are those who think that it is only effective if you say it several times. However, it is all right; it has been said now.

Mr. Thompson: No. I listened to your Honor, and what I heard you say, if I am correct, after you submitted the first case then you would submit the second

case; you didn't say whether or not it depended on the outcome.

The Court: All right.

Mr. Thompson: I ask your Honor to charge the jury, in my number requests in this case here, No. 2, and I ask you to charge that No. 3 applies to both the negligence and the unseaworthy cause of action, and I ask your Honor to charge the No. 5 and No. 6 in this cause of action in both cases.

[fol. 131] The Court: I apparently left—wait a minute. I have them here.

Your No. 2, what sheet are you looking at now? I don't have it. Bring it up and let me look at it, will you?

Mr. Thompson: The ones I have checked there (handing).

The Court: I decline to charge No. 2 and No. 5. I decline to charge No. 6. I decline to charge in the form in which they are offered here. I think the substance of those has already been covered in the charge. I decline so to charge, and you have an exception to each refusal to charge. All right.

Mr. Symmers: Your Honor, I have some further requests to make.

The Court: In connection with those you heretofore made?

Mr. Symmers: Yes.

The Court: Would you wait until my copy comes down? Or do you have an extra copy there that I might look at now? The plaintiff must have a copy of that which was submitted to me.

Here is my Clerk. I have one. Thank you, Mr. Symmers.

Mr. Symmers: I would like your Honor to charge 1 and 2. I think you have covered them in a general way. But specifically.

The Court: I can't imagine how, what you are suggesting in 1, it could be any clearer. This is another case of repeating it.

Mr. Symmers: I withdraw that request. I think you have covered it, your Honor.

Charge No. 7, if you will.

The Court: I have left that to the jury to determine

whether or not that was an appurtenance of the ship and [fol. 132] whether its condition, as the jury finds it to be, did or did not constitute an unseaworthy condition in the ship. I decline, and you have an exception.

Mr. Symmers: No. 15.

The Court: That is refused. You have an exception.

Mr. Symmers: No. 21 and No. 23.

The Court: I decline to charge No. 21 in the light of the decision in the Petterson case as affirmed by the Supreme Court. You have an exception.

No. 23 I think involves the same principle, and on that ground I deny that, and you have an exception.

Now, one thing more, I think, probably in view of what just happened, I ought to point out to you ladies and gentlemen and that is, that these rulings, for instance, this refusal to charge and allowing an exception and all like that, those are matters of law that do not concern you at all. They have nothing to do with whether or not somebody is responsible here. Those are only matters of law which have been developed over the years to make sure that only the right things, admissible evidence, get before the jury and that the Court gives an accurate instruction.

I have had occasion, not too often but a few times, during the trial to overrule objections that were made by various counsel. That has nothing to do with any consideration that you have to concern yourselves with. Again, that is a matter of law. Counsel trying a lawsuit on either side are obliged, in their duty to their client, to object to any evidence that they think is improper, and the fact that they do so is not to be held against the client surely nor even against them.

So all of those matters are matters for my worry and my headache, not yours.

[fol. 133] All right. Now, ladies and gentlemen, you may withdraw for your deliberations.

(Marshals sworn and the jury retired to deliberate at 2:45 p. m.)

(At 4:45 p. m. in the absence of the jury the following took place:)

The Court: I have a sealed note here from the jury which I will now open.

"May the matron please make some telephone calls for us to our families?"

I take it nobody has any objection to that.

All right.

(A dinner recess was taken at approximately 5:55 p. m.)

(The jury returned to the courtroom at 8:05 p. m.)

The Clerk: The jurors will please answer as their names are called.

(Clerk calls names of jurors and each one answers.)

VERDICT

The Clerk: Madam Foreman, have you agreed upon a verdict?

The Foreman: Yes, we have.

The Clerk: How do you find?

The Foreman: We award for the plaintiff in the first count in the amount of $50,000.

We find for the defendant on the second count.

[fol. 134] The Court: Now, are there any motions with respect to that verdict?

Mr. Symmers: Your Honor, may we reserve our motions until the end of the entire case?

The Court: You may.

Now, ladies and gentlemen, in view of your verdict on the first cause of action, which was the negligence charge and which you find for the plaintiff in the sum of $50,000, I now direct you to enter a verdict for the third party defendant Nacirema.

The Clerk: Verdict for Nacirema.

The Court: The verdict for the defendant is entered. Very well.

Now, ladies and gentlemen of the jury, you gave a great deal of attention to this and you spent a long period considering it, and you are now discharged with the thanks of the Court. Your work is completed, and we have now disposed of the case of the plaintiff against the ship, or the

shipping company, and the case of the shipping company against the third party defendant.

Thank you very much for your services. You are excused.

(Jurors excused.)

[fol. 135] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 350—October Term, 1955.
(Argued May 16, 1956.)
Docket No. 23197

WILLIAM CONNOLLY,

v.

WEYERHAEUSER STEAMSHIP COMPANY, et al.

WEYERHAEUSER STEAMSHIP COMPANY, Defendant and Third-Party Plaintiff-Appellant,

v.

NACIREMA OPERATING CO., INC., Third-Party Defendant Appellee.

OPINION—September 11, 1956

Before:
Medina, Lumbard and Waterman, Circuit Judges.

William Connolly, employed by stevedore, Nacirema Operating Co., Inc., sued vessel owner, Weyerhaeuser Steamship Company, for injuries sustained by him while unloading its vessel and received jury verdict in his favor on allegation that steamship company was negligent. Weyerhaeuser Steamship Company, having impleaded Nacirema [fol. 136] Operating Co., Inc. for indemnity, appeals from directed verdict against it by the U. S. District Court for the Southern District of New York, John F. X. McGohey, Judge. Affirmed.

Dow & Symmers (William G. Symmers, Frederick Fish, of Counsel), New York City, for Defendant and Third-Party Plaintiff-Appellant.

Galli & Locker (Oscar A. Thompson, Patrick E. Gibbons, of Counsel), New York City, for Third-Party Defendant-Appellee.

WATERMAN, Circuit Judge:

William Connolly, a Boston longshoreman employed by Nacirema Operating Co., a New York corporation, was seriously injured aboard the steamship "F. E. Weyerhaeuser" a vessel owned by Weyerhaeuser Steamship Company, a Delaware corporation, when he was struck on the head by a piece of wood while working at the bottom of No. 1 lower hold. Nacirema Operating Co. is an independent contracting stevedore and had contracted with Weyerhaeuser to discharge cargo at the ports of New York and Boston. The S.S. F. E. Weyerhaeuser had carried a full cargo of lumber including a deck load, from the West Coast to New Yo.. Her deck load and part of her underdeck cargo had been discharged there by Nacirema, and the ship had then proceeded to Boston to discharge the remainder. On the fifth working day after docking in navigable water at Boston this accident happened. The piece of wood that struck Connolly was approximately four feet long, eight inches wide and one inch thick. There was credible evidence that the only possible place from which it could have fallen was the top of a temporary shelter [fol. 137] over the winches at No. 1 hatch, presumably erected by the longshoreman employes of Nacirema solely to protect them against the weather. This particular shelter was about 4 ft. x 6 ft. and some 7 ft. high. It was constructed of scrap lumber nailed together, and a tarpaulin was nailed across the top.

There was testimony from which the jury could reasonably conclude that at the time of the accident there was a loose second tarpaulin on top of the first one, not nailed down but held down by three boards of about the same size, and that one of these fell down the hatch into the hold and caused the injury.

Connolly alleged two causes of action against the shipowner Weyerhaeuser, one claiming the defendant negligent and the other claiming the ship unseaworthy. Weyerhaeuser brought a third-party complaint against Nacirema alleging the injury was caused by Nacirema's negligence and that Nacirema's contract with the shipowner entitled it to be indemnified for any damages that Connolly might recover from Weyerhaeuser.

The case was tried to a jury. The trial judge first submitted Connolly's case against Weyerhaeuser with a statement he was reserving submission of the cross-action until reception of the first verdict. The jury returned a verdict in favor of Connolly in the negligence cause of action and in favor of the ship in the unseaworthiness cause of action.[1] [fol. 138] Thereupon the Court directed a verdict in favor of Nacirema in the third-party action for indemnity. Weyerhaeuser appeals from this directed verdict and from the failure of the trial court to grant its motion for a directed verdict against Nacirema. Connolly is not a party to this appeal. His judgment against the shipowner has been paid and satisfied. The appeal before us relates only to the third-party proceedings.

The undisputed testimony was that shelters similar to the one at No. 1 hatch are routinely erected on the ships' decks by longshoremen at all United States ports upon the arrival of cargo vessels; that they serve no purpose except for the personal convenience of the winch drivers; and that, the cargo having been discharged, the ships' crews tear them down as part of the process of squaring away the deck and making ready for sea again.

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[1] The trial court's charge on the issue of unseaworthiness appeared to exclude from the jury's consideration the condition of the winchmen's shelter. However, the correctness of the charge on the issue of unseaworthiness was not before us on this appeal. Therefore, we need not resolve the question that perhaps there might have been a conflict between that charge and the holding in the case of Pettersen v. Alaska S.S. Co. (9 Cir. 1953), 205 Fed. 2d 478, affirmed 1954, 347 U. S. 396, 74 S. Ct. 601 which appears to hold that a shipowner is liable on the ground of unseaworthiness for injuries received by an employee of a stevedoring company where injuries are caused by defective gear (a breaking block), brought on board by the stevedoring company.

There was a sharp conflict in the evidence on a most material point. Fellow longshoremen who worked with Connolly testified that when the S.S. "F. E. Weyerhaeuser" docked at Boston, shelters were already constructed at most of its hatches, including No. 1 hatch, so they did not construct a shelter at No. 1 hatch although they had arrived at shipside prepared to do so. The ship's officers emphatically denied that any shelters were on deck when the vessel docked. There was no testimony tending to show the ship's crew constructed them; and the only fair inference must be that they were erected there by longshoremen at the port of New York, who, like Connolly, were employees of Nacirema. The master stated that it "would be carelessness on the part of myself and the chief mate" if shelters erected in New York had been left on the vessel on its way to Boston, and the chief officer testified that it was his job to see that these shelters were taken down and that he would have been derelict in his duty if any were on the ship upon arrival in Boston.

[fol. 139] The Court charged the jury that Connolly could not recover damages from the shipowner if the jury should find that the shelters were not in place when the ship arrived in Boston. The jury verdict in favor of Connolly therefore establishes that the shelter over the winch drivers at No. 1 hatch was built before the ship arrived at Boston, that a board on top of it fell from it causing the injury, and that the shipowner negligently failed to perform a duty it owed to Connolly under the circumstances.

In this setting the shipowner now claims that Connolly's employer failed to perform a duty owed to the shipowner; that there would have been no injury to Connolly if this duty had been properly performed; and that therefore the stevedore company should indemnify the shipowner the amount of Connolly's judgment.

Even though the shipowner be found not liable for unseaworthiness it may be found liable in a negligence action if it does not provide a reasonably safe place for a business visitor, *Palazzolo* v. *Pan-Atlantic S.S. Corp.*, 2 Cir. (1954), 211 F. 2d 277, affirming the district court on this issue, 111 Fed. Supp. 505; *Fodera* v. *Booth American Shipping Corp.*, 2 Cir. (1947), 159 F. 2d 795; *Vanderlinden* v. *Lorentzen*,

2 Cir. (1944), 139 F. 2d 995. This is a duty the shipowner cannot delegate. It was clearly on this doctrine that the shipowner here was held liable.[2]

[fol. 140] The unsafe condition of the shelter (more specifically the loose board on the top thereof) was the proximate cause of the injury. Assuming a careless erection of the structure by longshoremen in New York the injury did not occur in New York, but in Boston—and in the meantime the structure was there to be seen on the ship's deck, and the ship had exclusive control over it. The ship negligently departed from established practice in not removing it. It was built to last only as needed in New York, and the New York longshoremen had no reason to anticipate that the structure would be standing when the vessel reached Boston and be offered as a shelter to the longshoremen there. If the New York-built structure had been removed, as all rules of good seamanship dictated, the Boston longshoremen would have erected their own shelter. Offering a ready-made shelter to Connolly the ship could not shift its non-delegable responsibility for the unsafe condition thereof onto Connolly's employer.

However, Weyerhaeuser relies upon *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.* (1956), 350 U. S. 124; 76 S. Ct. 232, affirming our decision in *Palazzolo* v. *Pan-Atlantic S.S., Pan-Atlantic S.S.* v. *Ryan Stevedoring Co., supra.* In that case a stevedoring contractor was found liable to reimburse a shipowner for damages paid by the latter to one of the contractor's longshoremen on account of injuries received by him in the course of his employment on shipboard where the contractor, without entering into

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[2] The court charged the jury, on the issue of the ship's negligence, as follows:

"Now, if you find from the evidence that the structure, that is, this shelter, was on the ship when it came into Boston Harbor and that the ship offered it to the stevedores to use and work with, and if you find that in permitting that to be there the ship was guilty of some act of negligence as I have defined it to you, then you could find a verdict for Mr. Connolly. But if you find that the shelter was not on that ship as he claims, or if you find that the accident did not happen as he claims it happened, then on this issue of negligence you would have to bring in a verdict for the ship."

an express agreement of indemnity, contracts to perform a shipowner's stevedoring operation and the longshoreman's injuries are caused by the contractor's unsafe stowage of the ship's cargo. Indemnity was awarded on the theory that there had been a breach by the contractor of its consensual implied obligation to stow cargo in a reasonably safe manner and thus to save the shipowner harmless for failure to do so.

[fol. 141] We do not consider the *Ryan Stevedoring* case controlling here. Though some of the facts are strikingly similar, there is a crucial fact here that is just as strikingly dissimilar, a fact that we believe differentiates the two cases and requires different results. In neither case was there an express agreement of indemnity. By written contract Nacirema undertook "to faithfully furnish such stevedoring services as may be required" and to provide "foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work." In *Ryan* the agreement was to perform all stevedoring operations. In the *Ryan* case Ryan's longshoremen in Georgetown, South Carolina improperly stowed rolls of pulp board weighing about 3200 pounds each in a hatch of a vessel operated by Pan-Atlantic Steamship in coastwise service. When the cargo was discharged at Brooklyn one of these improperly stowed rolls broke loose and injured a Ryan longshoreman there, one Frank Palazzolo. Palazzolo, having sued Pan-Atlantic alleging both negligence and unseaworthiness, recovered judgment on a general jury verdict. This judgment we, in *Palazzolo* v. *Pan-Atlantic, supra,* and then the Supreme Court in affirming us, required Ryan to indemnify.

A majority of the Supreme Court held that in agreeing to perform all of the shipowners' stevedoring requirements the stevedoring contractor agreed to discharge "*foreseeable* damages resulting to the shipowner from the contractor's improper performance of these requirements." (Italics ours.) *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, at ——, 76 S. Ct. 232 at 235, footnote 3, and authorities there cited.

It is precisely this fact of foreseeability that differentiates the cases. In the direct performance of [illegible] contractual duty of proper stowage a stevedoring contr[illegible]or is obvi-

ously chargeable with knowledge that improperly stowed cargo capable of rolling, moving, falling or propelling it-[fol. 142] self, might do so when the cargo is discharged, and thereby cause someone injury, which injury is directly traceable without any intervening factors to the original improper stowage. This is the *Ryan* case. But it is not the instant case. Here, a flimsy shelter built on deck for the convenience of longshoremen at one port, which it was negligent for the ship's officers not to have removed before docking at the second port, was permitted to remain in place by the ship's crew and was offered as a safe place to work to a longshoreman at the second port, thereby causing him injury.

This independent failure of duty by the ship could not have been reasonably foreseen by the stevedoring contractor. It was a negligent act of the ship alone not directly traceable to a breach of a duty to properly stow cargo.

The judgment below is affirmed.

LUMBARD, Circuit Judge (dissenting):

In my view this case is governed by *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956), affirming *Palazzolo* v. *Pan-Atlantic S.S. Corp.*, 211 F. 2d 277 (2 Cir. 1954). Since there was evidence in the record to support a jury finding that it was the active negligence of Nacirema which caused the plaintiff's injury, the direction of a verdict for Nacirema was erroneous.

My colleagues do not deny that the evidence in this case would be sufficient to support a jury finding that the loose boards were placed upon the winch shelter by Nacirema's longshoremen in New York. Nor do I understand them to deny that under the contract between Nacirema and Weyerhaeuser, Nacirema had a duty to perform its loading and unloading operations in a reasonably safe and workman-[fol. 143] like manner and an obligation to indemnify Weyerhaeuser for any injury to it resulting from the negligent conduct of the unloading and loading operations. Indeed this much indisputably follows from the *Ryan* case.

The majority seeks to distinguish the *Ryan* case by arguing that here Weyerhaeuser was guilty of intervening active negligence in failing to tear down the shelter upon

leaving New York, and that this negligence by Weyerhaeuser absolves Nacirema of responsibility. The majority seems to employ this argument in two ways. First, it is argued that Nacirema's negligence was not a proximate cause of the injury to Connolly because it was not foreseeable that Weyerhaeuser would fail to remove the shelter before the ship reached Boston. Second, it is argued that even if Nacirema's negligence was a proximate cause of the accident, Weyerhaeuser is barred from recovering indemnity because it was guilty of independent active negligence which contributed to the injury.

Let us assume with the majority, that Weyerhaeuser was guilty of negligence as a matter of law in failing to tear down the shelter. Such negligence is not implicit in the jury's verdict in favor of Connolly since that might well have been based on Weyerhaeuser's failure to detect the negligent construction of the shelter rather than its failure to tear it down upon leaving New York. But all of the testimony in the case indicates that it was the custom to remove such shelters upon leaving port and that it was dangerous to leave them standing when the ship went to sea.

But merely because Weyerhaeuser was guilty of intervening negligence, it does not necessarily follow that the chain of causation was broken between Nacirema's negligence and the injury to the longshoreman. Where a person negligently creates a risk of harm, he is not ordinarily [fol. 144] permitted to escape liability merely because he assumed that someone else would, in the performance of an independent duty, terminate or protect against the risk which he created. Cf. Restatement of Torts §§447, 452. But even if we assume that Nacirema was entitled to rely on Weyerhaeuser's tearing down the shelter, and even if we assume that it was unforeseeable that Weyerhaeuser might fail in this duty, it does not follow that Nacirema was guiltless of negligence which caused the injury. Nacirema had a continuing duty to use in its work reasonably safe equipment and reasonably safe methods. When it commenced unloading in Boston its employees presumably discovered and used this structure which had been constructed by its employees in New York. Even if the risk

resulting from the negligence in New York had ended, a new risk arose when Nacirema began to use in Boston the negligently constructed shelter. Merely because the shelter had been allowed to stand while the ship traveled from New York to Boston it does not follow that it in some way became a part of the ship so that responsibility for it passed over from the stevedore to the shipowner. It was still a piece of equipment supplied by the stevedore for use in its work, and responsibility for its dangerous condition rested primarily on the stevedore. Therefore I cannot agree that a jury could not have found that Nacirema's negligence was a proximate cause of the accident.

Nor am I convinced that Weyerhaeuser was guilty, as a matter of law, of active negligence such as would bar indemnity. I have assumed that Weyerhaeuser was guilty of negligence in failing to dismantle the shelter upon leaving New York. I am willing to admit also that this negligence was active negligence. It does not follow, however, that this active negligence was a proximate cause of the injury to Connolly.

[fol. 145] Weyerhaeuser's duty to tear down the shelter was quite unrelated to the defectiveness of the shelter or to the risk resulting from its dangerous condition. The custom was to tear down all such shelters, defective or not, because it was dangerous to have such structures on a ship at sea. The testimony was that high winds at sea might blow them down causing a risk of injury from flying timbers. If the plaintiff here had been a seaman injured in this manner while on the voyage, I have no doubt that Weyerhaeuser would be liable for its negligence in leaving the shelter standing.

In this case, however, Connolly's injury did not occur at sea and did not result from the risk created by Weyerhaeuser's breach of its duty to tear down the shelter. Suppose, for example, that Weyerhaeuser had removed the shelter upon leaving New York and had handed it over to the stevedore upon arriving in Boston. Weyerhaeuser would not then be guilty of any active negligence, but if the stevedore had continued to use the shelter the accident would still have happened.

It is true that Weyerhaeuser had the additional duty of

providing the longshoremen with a safe place to work and that the jury has properly found it liable for a breach of this duty. But insofar as Weyerhaeuser is liable only for allowing Nacirema to use an unsafe shelter, its negligence is passive, not active. Its negligence in this respect is comparable to the negligence of the shipowner in the *Ryan* case. There the owner had a duty to supervise and inspect the loading of the cargo. This duty was nondelegable and the shipowner was held liable for failing to perform it. But the Supreme Court held in the *Ryan* case that this negligence did not bar indemnity from the stevedore which was primarily responsible for the loading. In the same manner Weyerhaeuser's failure to inspect the shelter used [fol. 146] by Nacirema does not bar it from recovering indemnity for injuries resulting from Nacirema's failure to use proper equipment.

The district court should have left the issue of Nacirema's liability to the jury. We should, therefore, reverse and remand for that purpose.

[fol. 147] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM CONNOLLY, Plaintiff,

v.

WEYERHAEUSER STEAMSHIP COMPANY, Defendant-Appellant
NACIREMA OPERATING CO. INC., Defendant-Appellee

JUDGMENT—September 11, 1956

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk

[fol. 148] (File Endorsement Omitted)

[fol. 159] United States Court of Appeals
Second Circuit

William Connolly, Plaintiff,

v.

Weyerhaeuser Steamship Company, Defendant-Appellant
Nacirema Operating Company, Inc., Defendant-Appellee

Order Denying Petition for Rehearing—November 5, 1956

A petition for a rehearing having been filed herein by counsel for the defendant-appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

[fol. 160] (File Endorsement Omitted)

[fol. 165] UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

WILLIAM CONNOLLY, Plaintiff,

v.

WEYERHAEUSER STEAMSHIP COMPANY, Defendant-Appellant
NACIREMA OPERATING COMPANY, INC., Defendant-Appellee

ORDER DENYING PETITION FOR REHEARING IN BANC—
November 5, 1956

A petition for a rehearing in banc having been filed herein by counsel for the defendant-appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

[fol. 166] (File Endorsement Omitted)

[fol. 167] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT
(omitted in printing)

[fol. 168] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 11, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 75

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner.

—against—

NACIREMA OPERATING CO. INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM GARTH SYMMERS,
Counsel for Petitioner,
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New York 5, N. Y.

FREDERICK FISH,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

v.

NACIREMA OPERATING CO. INC.,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Weyerhaeuser Steamship Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on September 11, 1956, petitions for rehearing and for rehearing in banc having been denied on November 5, 1956.

Opinion Below

No opinion was rendered in the District Court.

The opinion of the United States Court of Appeals for the Second Circuit is printed in the appendix hereto (pp. 15-26) and also annexed to the record of the Court below (R. 135) and is reported in 236 F. 2d 848.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 11, 1956 (R. 148; App. 27, 28). Timely petitions for rehearing and for rehearing in banc were filed on September 20, 1956 (R. 149, 161) and were denied on November 5, 1956 (R. 159, 165). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented

1. Whether a shipowner is entitled to a jury determination of issues of fact in its claim for indemnity against a stevedore in an action originally brought by a longshoreman employee of the stevedore against the shipowner for personal injuries sustained when he was struck by a board which fell from a shelter constructed at a prior port by the same stevedore for the exclusive benefit of its longshoremen.

2. Whether a shipowner is entitled to indemnity from a stevedore by reason of the stevedore's negligence in maintaining and using, for the sole benefit of the stevedore's longshoremen employees, a shelter built by the stevedore, in a case where a longshoreman recovered damages from the shipowner for personal injuries sustained by reason of the stevedore's maintenance and use of the shelter in a dangerous condition.

Constitutional Provision Involved

The Seventh Amendment to the Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried

by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT

Action was originally brought in this case by William Connolly, a resident of Boston, Massachusetts (R. 6) against petitioner, Weyerhaeuser Steamship Company, a Delaware Corporation (R. 7) by reason of personal injuries (fractured skull and subsequent total disability) sustained while he was employed as a longshoreman by respondent, Nacirema Operating Co., Inc., a New York corporation (R. 13) on board petitioner's vessel, the SS F E WEYERHAEUSER at Boston, when a piece of board fell on his head while he was working in a lower hold. Jurisdiction was based upon diversity of citizenship of the parties, the amount in controversy being in excess of $3,000 (R. 7).

Jury trial was claimed by Connolly. (R. 1)

Petitioner filed a third-party complaint against respondent claiming right of indemnity in the event that it should be held liable to Connolly (R. 13-17).

Jury trial was had before Judge McGohey in the Southern District of New York. At the conclusion of the testimony, petitioner moved for a directed verdict in its favor against respondent. Decision on this motion was reserved. The Court then submitted to the jury only the case of Connolly against petitioner, stating that the claim over of petitioner against respondent would be submitted to the jury following their disposition of the case as between the original plaintiff and petitioner (R. 116). The jury returned a verdict in favor of Connolly against petitioner on the first count of the complaint, based on negligence. It returned a verdict in favor of petitioner on the second count of the complaint, based on unseaworthiness. The Court then directed the jury to return a verdict in favor of

respondent against petitioner in the third-party action (R. 134).

Following these verdicts, petitioner moved that the verdict in favor of respondent be set aside and that judgment be entered in favor of petitioner against respondent. Motion was also made in the alternative for a new trial (R. 24-26). The trial court denied all these motions.

Judgment in favor of Connolly against petitioner has been paid and satisfied. An appeal was taken to the Court of Appeals for the Second Circuit involving only petitioner's claim for indemnity from respondent. Judgment in favor of respondent against petitioner was affirmed by a divided court (R. 135-148).

The SS F E WEYERHAEUSER is a Liberty ship, owned and operated by petitioner. She had carried a full cargo of lumber, including a deck load, from the West Coast to New York and then Boston. Discharge of cargo at both New York and Boston was performed by respondent pursuant to a standard form of stevedoring contract. The contract provided that respondent would "faithfully furnish" stevedoring services as required by the shipowner and furnish "foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work." The whole reach of the vessel's deck, holds and cargo equipment were turned over to and came under the control of the stevedore for cargo operations (R. 77, 78, 98, 113, 114). The deck load and part of the underdeck cargo was discharged at Brooklyn, New York commencing January 25, 1952. The vessel left New York on January 30, 1952 and proceeded to Boston where she arrived on the afternoon of Thursday, January 31.

Discharge of cargo commenced at Boston on the afternoon of January 31st and continued through February 1st, 2nd, 3rd and 4th. The weather at Boston was reasonably good until February 4th, although there was slight

precipitation on Saturday, February 2nd. Winds varied from force 1 to 3 on the Beaufort scale and were recorded in the ship's log on Monday, February 4th, at force 2. There was persistent rain on February 4th from the early morning hours.

Four gangs of longshoremen came on board at eight o'clock Monday morning, February 4th. Plaintiff, a longshoreman, was working at the bottom of No. 1 lower hold. At about ten o'clock in the morning he was struck on the head by a piece of wood, which appeared to be a piece of dunnage four or five feet long, eight inches wide and one inch thick. He was seriously injured.

There were no-eye-witnesses to the accident among the ship's personnel. The accident was reported to the acting second mate, who on the same date noted the following entry in the ship's log:

> "1000 Piece of wood from winch drivers shelter (built by them) #1 Hatch fell into #1 LH hitting longshoreman William J. Connolly on head. Hatch tender Pat Devine. Man sent out of hold on stretcher. No ship's gear involved in any manner." (Defendant's Exhibit "C", R. 97).

There was testimony from a number of the longshoremen, including the two winch drivers assigned to No. 1 hatch, that at the time of the accident no actual handling of lumber with ship's gear was being performed at that hatch. They said that the only possible place from which the piece of lumber could have come was from the top of a temporary shelter (R. 43, 60, 61) which had been erected over the winches solely for the winch drivers' own convenience and to protect them from the weather (R. 36, 37, 66, 70, 74, 99, 195). They testified that this shelter was made of scrap lumber, nailed together, with a tarpaulin nailed over the top of it.

The longshoremen, insisted that although it was extremely unusual, some of them said unknown, for a ship to come into a port with such a shelter already erected, that, nevertheless, this ship did have four such shelters in place when it arrived at Boston four days prior to the accident. They said that they had done nothing in connection with construction of this particular shelter and that they had not even examined it carefully or at all (R. 56, 67).

There was further testimony that the shelter was not part of the ship's gear, that it had nothing to do with the working of the ship or its gear (R. 105, 114), that such shelters are built solely for the winch drivers' own personal convenience, are built by them and are always erected immediately upon the arrival of a ship, regardless of the weather (R. 70). The testimony was that such shelters are always erected by longshoremen at all ports in this country, including New York (R. 36-37, 70, 74).

There was further testimony that upon leaving port it was customary for a ship's crew to tear down such shelters in the process of clearing up or "squaring away" the deck and making the vessel ready for sea. This is ordinarily done for the safety of the seamen in the performance of their duties of handling the vessel at sea and handling lines while making fast to a pier at the end of a voyage (R. 71-72).

The ship's officers specifically denied that any shelters were in place when the ship arrived at Boston. As to this, the jury was instructed that plaintiff's claim would fail unless the accident occurred as described by plaintiff's witnesses and that if the jury should find that the shelters were not in place when the ship arrived at Boston, verdict should be for the defendant (R. 118).

On the disputed evidence therefore, the jury's verdict has established as a fact for the purpose of this case that the shelter over the winchmen at No 1 hatch had been built prior to the ship's arrival at Boston (See R. 118).

The instructions of the Court and the verdict of the jury have further established that the ship itself and all its appurtenances were seaworthy, that the shelter was not an appurtenance of the ship (R. 119-120) but that petitioner was negligent in failing to inspect the shelter and to make sure that there was no loose material on it which could fall from it in such a way as to endanger the longshoremen (R. 119).

The majority of the Court of Appeals have found that although there was sufficient evidence that the shelter was built by respondent at New York in a careless manner, the case is to be distinguished from *Ryan Stevedoring Co.* v. *Pan Atlantic SS Corp.*, 350 US 124, in that it was not foreseeable that respondent's improper performance of its duty as a stevedore at New York would result in an injury to a longshoreman at Boston. Judge Lumbard dissented on the grounds that it did not necessarily follow that the chain of causation was broken by petitioner's failure to tear down the shelter at sea; that in any event respondent had a continuing duty at Boston to use in its work reasonably safe equipment and reasonably safe methods; that a new risk arose when respondent began to use in Boston the negligently constructed shelters; that responsibility for the dangerous condition rested primarily on the stevedore; that insofar as petitioner was liable only for allowing respondent to use an unsafe shelter its negligence was passive and not active, and that such negligence is comparable to the negligence of the shipowner in the *Ryan* case. It is Judge Lumbard's opinion that in any event the District Court should have left the issue of respondent's liability to the jury (R. 142-146, App. 22-26).

REASONS FOR GRANTING THE WRIT

I. The direction of a verdict for the respondent has, in effect, deprived petitioner of its constitutional right to a jury trial.

On the basis of the evidence, the trial judge's charge, and the jury's verdict against the shipowner, it must be assumed that respondent, petitioner's contracting stevedore, erected a shelter over the ship's winch at New York; that this shelter was supplied by the stevedore solely for use in connection with the performance of stevedore work; and that the shelter was unsafe. It must be further assumed that the jury in finding the shipowner negligent, found as a fact that the winch drivers' shelter was not demolished by the ship's crew after leaving New York, that it was on the ship upon her arrival at Boston, and that respondent's longshoremen used this shelter in connection with their stevedoring operations.

The instructions of the Court and the verdict of the jury have further established that the ship itself and all its appurtenances were seaworthy and that the shelter was not an appurtenance of the ship.

There was, therefore, substantial evidence in support of the following propositions:

a) The instrumentality that caused the accident was constructed by respondent, was used solely for its benefit and was in its exclusive control,

b) Respondent was negligent in using the shelter at Boston without so much as a casual inspection to ascertain its condition,

c) The primary obligation to furnish the longshoremen a safe place to work rested upon their employer, the respondent.

d) Negligence found on the part of petitioner was merely for breach of a "non-delegable duty" and was passive in nature,

e) The active or primary negligence which caused the accident was solely that of respondent.

These issues were matters for the jury. To deny petitioner at least a jury determination as to the nature of the stevedore's negligence and of the issues of causation was an extreme departure from precedent. In *McFall* v. *Compagnie Maritime Belge*, (1952) 304 N. Y. 314, involving a stevedore's obligation to indemnify a shipowner, the New York Court of Appeals said:

> "Where several tort-feasors are involved an implied contract of indemnity arises in favor of the wrongdoer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent. * * * Whether negligence is passive or active is, generally speaking, a question of fact for the jury" (p. 328).

See also *Schulz* v. *Pennsylvania R. Co.*, (1956) 350 U. S. 523; and see *Seawright* v. *A. Garcia y Cia, Ltda.* (E. D. Pa. 1956), 138 F. Supp. 881, where it was said at page 884:

> "Without a further jury determination it is impossible to ascertain at this time whether such negligence on the part of the shipowner constituted primary or secondary, active or passive tortious conduct, * * *."

II. The decision of the majority of the Court of Appeals for the Second Circuit, is, we submit, in direct conflict with the decision of this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, (1956) 350 U. S. 133, and in any event unduly limits the scope of that decision; it is also in conflict with the decisions of the Court of Appeals for the Ninth Circuit in *American President Lines, Ltd.* v. *Marine Terminals Corp.*, (1956) 234 F. 2d 753, certiorari denied, 352 U. S. 926, and *United States* v. *Rothschild International Stevedoring Co.*, (1950) 183 F. 2d 181.

Petitioner has relied upon the decision of this Court in the *Ryan Stevedoring* case. It is conceded in the majority of opinion of the Court of Appeals in the case at bar that the facts here are "strikingly similar" to the *Ryan Stevedoring* case, and Judge Lumbard in his dissenting opinion agrees that the case at bar is, in fact, governed by the *Ryan Stevedoring* case.

In the majority of the opinion of the Court of Appeals, the *Ryan Stevedoring* case is differentiated on the theory that in performance of the shipowner's stevedoring requirements it was implicit that the stevedoring contractor agreed to indemnify the shipowner only for "foreseeable damages resulting from the contractor's improper performance of these requirement". We submit that the case is not distinguishable on this ground.

In *Ryan Stevedoring* the stevedore in South Carolina negligently loaded rolls of pulp board, so that when the ship arrived at New York and was being unloaded, the stowed rolls fell upon and injured a New York longshoreman employed by the same stevedore. The ship's chief officer was responsible for safe stowage of cargo and for over-all supervision of the loading done by Ryan, but nevertheless the Court of Appeals held the negligence of the ship to be passive, while the negligence of Ryan as stevedore, was

held to be active. The shipowner accordingly was allowed indemnity from the stevedore. This Court affirmed on the basis of the stevedore's "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product" (350 U. S. at 133, 134).

In both cases we have the same situation: a negligent act by the stevedore in one port, which created a dangerous condition and directly caused an injury to a longshoreman employee of the same stevedore at a second port, with the shipowner held responsible in the first instance for the acitve negligence of the stevedore.

In the *Ryan Stevedoring* case the contract merely called for the stevedore to perform all stevedoring operations. In the case at bar, respondent, as stevedore, agreed "to faithfully furnish such stevedoring services as may be required", which amounts to the same thing; and respondent further affirmatively agreed to provide foremen and "such other stevedoring supervision as are needed for the proper and efficient conduct of the work" (R. 77).

The active negligence of the stevedore was not merely (a) in building an unsafe structure for its own employees, but more particularly included (b) using it at Boston without so much as a casual inspection to ascertain its condition. The test of foreseeability applied in the majority opinion relates only to the first specification; it is inapplicable to the second specification which involved breach of the primary obligation that rested upon the stevedore to perform its work at Boston (as well as at New York) in a safe manner.

In the case at bar the stevedore built and used the defective shelter, and in so doing breached its contractual warranty of supplying proper supervision and equipment. Moreover, no shipowner's employees were using or intended to use the defective instrumentality. The shelter was not

a part of the ship. The ship was found by the jury to be seaworthy. Since it was not supplied by the shipowner, and was not a part of the ship, *there was no warranty as to its condition by the shipowner to the stevedoring contractor.* Its use by the stevedore's employees at Boston without supervision or inspection by the stevedore foreman or others was, on the contrary, a breach of the stevedore's contractual warranty.

As stated by this Court in the *Ryan Stevedoring* case:

> "the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty, as a defense" (350 U. S. at 134).

The decision of the Court of Appeals for the Second Circuit is also in conflict with decisions of the Court of Appeals for the Ninth Circuit.

In *American President Lines, Ltd.* v. *Marine Terminals Corp.*, (9 Cir., 1956) 234 F. 2d 753, certiorari denied 352 U. S. 926, a longshoreman was injured by a falling hatch beam which had no locking device, as to which the stevedore had received warning. The shipowner, liable to the longshoreman by reason of the defective condition of its own vessel, was nevertheless held entitled to be indemnified by the stevedore.

In *United States* v. *Rothschild International Stevedoring Co.*, (9 Cir., 1950) 183 F. 2d 181, a longshoreman was injured by the operation of a winch which was known by both the shipowner and the stevedore to be faulty. The longshoreman recovered judgment against the shipowner, but the shipowner was held entitled to indemnity from the stevedore because of the active negligence of the stevedoring in continuing to use the faulty winch.

III. The question here involved is of utmost importance.

This Court has considered the problem of shipowners' liabilities to longshoremen and rights to indemnity from stevedores in numerous recent cases; e. g., *Seas Shipping Company* v. *Sieracki* (1946), 328 U. S. 85; *American Stevedores* v. *Porello* (1947), 330 U. S. 446; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.* (1952), 342 U. S. 282; *Pope & Talbot, Inc.* v. *Hawn*, (1953), 346 U. S. 406, and of course the *Ryan Stevedoring Case* (1956), 350 U. S. 124. These decisions illustrate the importance of the question.

In the 84th Congress hearings were held on a number of proposals further to clarify the question of third-party liability. See: Hearings before a Special Subcommittee for the Committee on Education and Labor, House of Representatives, 84th Cong., 2nd Sess., May 23, 24 and June 11, 1956. The hearings reflect the intense interest in the subject on the part of all segments of the shipping industry and of the Admiralty Bar (pp. 69-73, 108-09). They also reflect the great reliance of those appearing before the Committee on the impartial reasoning of the Judiciary in the cases decided to date.

The conflict and dilemma with which the Bar is now confronted regarding shipowners' rights for indemnity from stevedores should be clarified.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM GARTH SYMMERS,
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FREDERICK FISH,
Of Counsel.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 350—October Term, 1955.

(Argued May 16, 1956 — Decided September 11, 1956.)

Docket No. 23197

WILLIAM CONNOLLY,

—v.—

WEYERHAEUSER STEAMSHIP COMPANY, *et. al.*

WEYERHAEUSER STEAMSHIP COMPANY,
Defendant and Third-Party Plaintiff-Appellant,

—v.—

NACIREMA OPERATING CO., INC.,
Third-Party Defendant Appellee.

Before:

MEDINA, LUMBARD and WATERMAN,
Circuit Judges.

William Connolly, employed by stevedore, Nacirema Operating Co., Inc., sued vessel owner, Weyerhaeuser Steamship Company, for injuries sustained by him while unloading its vessel and received jury verdict in his favor on allegation that steamship company was negligent. Weyerhaeuser Steamship Company, having impleaded

Nacirema Operating Co., Inc. for indemnity, appeals from directed verdict against it by the U. S. District Court for the Southern District of New York, John F. X. McGohey, *Judge*. Affirmed.

DOW & SYMMERS (William G. Symmers, Frederick Fish, of Counsel), New York City, *for Defendant and Third-Party Plaintiff-Appellant.*

GALLI & LOCKER (Oscar A. Thompson, Patrick E. Gibbons, of Counsel), New York City, *for Third-Party Defendant-Appellee.*

WATERMAN, *Circuit Judge*:

William Connolly, a Boston longshoreman employed by Nacirema Operating Co., a New York corporation, was seriously injured aboard the steamship "F. E. Weyerhaeuser" a vessel owned by Weyerhaeuser Steamship Company, a Delaware corporation, when he was struck on the head by a piece of wood while working at the bottom of No. 1 lower hold. Nacirema Operating Co. is an independent contracting stevedore and had contracted with Weyerhaeuser to discharge cargo at the ports of New York and Boston. The S. S. F. E. Weyerhaeuser had carried a full cargo of lumber, including a deck load, from the West Coast to New York. Her deck load and part of her underdeck cargo had been discharged there by Nacirema, and the ship had then proceeded to Boston to discharge the remainder. On the fifth working day after docking in navigable water at Boston this accident happened. The piece of wood that struck Connolly was approximately four feet long, eight inches wide and one inch thick. There was credible evidence that the only possible place from which it could have fallen was the top of a temporary shelter

over the winches at No. 1 hatch, presumably erected by the longshoreman employes of Nacirema solely to protect them against the weather. This particular shelter was about 4 ft. x 6 ft. and some 7 ft. high. It was constructed of scrap lumber nailed together, and a tarpaulin was nailed across the top.

There was testimony from which the jury could reasonably conclude that at the time of the accident there was a loose second tarpaulin on top of the first one, not nailed down but held down by three boards of about the same size, and that one of these fell down the hatch into the hold and caused the injury.

Connolly alleged two causes of action against the shipowner Weyerhaeuser, one claiming the defendant negligent and the other claming the ship unseaworthy. Weyerhaeuser brought a third-party complaint against Nacirema alleging the injury was caused by Nacirema's negligence and that Nacirema's contract with the shipowner entitled it to be indemnified for any damages that Connolly might recover from Weyerhaeuser.

The case was tried to a jury. The trial judge first submitted Connolly's case against Weyerhaeuser with a statement he was reserving submission of the cross-action until reception of the first verdict. The jury returned a verdict in favor of Connolly in the negligence cause of action and in favor of the ship in the unseaworthiness cause of action.[1]

---

1 The trial court's charge on the issue of unseaworthiness appeared to exclude from the jury's consideration the condition of the winchmen's shelter. However, the correctness of the charge on the issue of unseaworthiness was not before us on this appeal. Therefore, we need not resolve the question that perhaps there might have been a conflict between that charge and the holding in the case of *Pettersen* v. *Alaska S.S. Co.* (9 Cir. 1953), 205 Fed. 2d 478, affirmed 1954, 347 U. S. 396, 74 S. Ct. 601 which appears to hold that a shipowner is liable on the ground of unseaworthiness for injuries received by an employee of a stevedoring company where injuries are caused by defective gear (a breaking block), brought on board by the stevedoring company

Thereupon the Court directed a verdict in favor of Nacirema in the third-party action for indemnity. Weyerhaeuser appeals from this directed verdict and from the failure of the trial court to grant its motion for a directed verdict against Nacirema. Connolly is not a party to this appeal. His judgment against the shipowner has been paid and satisfied. The appeal before us relates only to the third-party proceedings.

The undisputed testimony was that shelters similar to the one at No. 1 hatch are routinely erected on the ships' decks by longshoremen at all United States ports upon the arrival of cargo vessels; that they serve no purpose except for the personal convenience of the winch drivers; and that, the cargo having been discharged, the ships' crews tear them down as part of the process of squaring away the deck and making ready for sea again.

There was a sharp conflict in the evidence on a most material point. Fellow longshoremen who worked with Connolly testified that when the S. S. "F. E. Weyerhaeuser" docked at Boston, shelters were already constructed at most of its hatches, including No. 1 hatch, so they did not construct a shelter at No. 1 hatch although they had arrived at shipside prepared to do so. The ship's officers emphatically denied that any shelters were on deck when the vessel docked. There was no testimony tending to show the ship's crew constructed them; and the only fair inference must be that they were erected there by longshoremen at the port of New York, who, like Connolly, were employees of Nacirema. The master stated that it "would be carelessness on the part of myself and the chief mate" if shelters erected in New York had been left on the vessel on its way to Boston, and the chief officer testified that it was his job to see that these shelters were taken down and that he would have been derelict in his duty if any were on the ship upon arrival in Boston.

The Court charged the jury that Connolly could not recover damages from the shipowner if the jury should find that the shelters were not in place when the ship arrived in Boston. The jury verdict in favor of Connolly therefore established that the shelter over the winch drivers at No. 1 hatch was built before the ship arrived at Boston, that a board on top of it fell from it causing the injury, and that the shipowner negligently failed to perform a duty it owed to Connolly under the circumstances.

In this setting the shipowner now claims that Connolly's employer failed to perform a duty owed to the shipowner; that there would have been no injury to Connolly if this duty had been properly performed; and that therefore the stevedore company should indemnify the shipowner the amount of Connolly's judgment.

Even though the shipowner be found not liable for unseaworthiness it may be found liable in a negligence action if it does not provide a reasonably safe place for a business visitor, *Palazzolo* v. *Pan-Atlantic S. S. Corp.*, 2 Cir. (1954), 211 F. 2d 277, affirming the district court on this issue, 111 Fed. Supp. 505; *Fodera* v. *Booth American Shipping Corp.*, 2 Cir. (1947), 159 F. 2d 795; *Vanderlinden* v. *Lorentzen*, 2 Cir. (1944), 139 F. 2d 995. This is a duty the shipowner cannot delegate. It was clearly on this doctrine that the shipowner here was held liable.[2]

---

2 The court charged the jury, on the issue of the ship's negligence, as follows:

"Now, if you find from the evidence that the structure, that is, this shelter, was on the ship when it came into Boston Harbor and that the ship offered it to the stevedores to use and work with, and if you find that in permitting that to be there the ship was guilty of some act of negligence as I have defined it to you, then you could find a verdict for Mr. Connolly. But if you find that the shelter was not on that ship as he claims, or if you find that the accident did not happen as he claims it happened, then on this issue of negligence you would have to bring in a verdict for the ship."

The unsafe condition of the shelter (more specifically the loose board on the top thereof) was the proximate cause of the injury. Assuming a careless erection of the structure by longshoremen in New York the injury did not occur in New York, but in Boston—and in the meantime the structure was there to be seen on the ship's deck, and the ship had exclusive control over it. The ship negligently departed from established practice in not removing it. It was built to last only as needed in New York; and the New York longshoremen had no reason to anticipate that the structure would be standing when the vessel reached Boston and be offered as a shelter to the longshoremen there. If the New York-built structure had been removed, as all rules of good seamanship dictated, the Boston longshoremen would have erected their own shelter. Offering a ready-made shelter to Connolly the ship could not shift its non-delegable responsibility for the unsafe condition thereof onto Connolly's employer.

However, Weyerhaeuser relies upon *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.* (1956), 350 U. S. 124; 76 S. Ct. 232, affirming our decision in *Palazzolo* v. *Pan-Atlantic S. S., Pan-Atlantic S. S.* v. *Ryan Stevedoring Co., supra.* In that case a stevedoring contractor was found liable to reimburse a shipowner for damages paid by the latter to one of the contractor's longshoremen on account of injuries received by him in the course of his employment on shipboard where the contractor, without entering into an express agreement of indemnity, contracts to perform a shipowner's stevedoring operation and the longshoreman's injuries are caused by the contractor's unsafe stowage of the ship's cargo. Indemnity was awarded on the theory that there had been a breach by the contractor of its consensual implied obligation to stow cargo in a reasonably safe manner and thus to save the shipowner harmless for failure to do so.

We do not consider the *Ryan Stevedoring* case controlling here. Though some of the facts are strikingly similar, there is a crucial fact here that is just as strikingly dissimilar, a fact that we believe differentiates the two cases and requires different results. In neither case was there an express agreement of indemnity. By written contract Nacirema undertook "to faithfully furnish such stevedoring services as may be required" and to provide "foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work." In *Ryan* the agreement was to perform all stevedoring operations. In the *Ryan* case Ryan's longshoremen in Georgetown, South Carolina improperly stowed rolls of pulp board weighing about 3200 pounds each in a hatch of a vessel operated by Pan-Atlantic Steamship in coastwise service. When the cargo was discharged at Brooklyn one of these improperly stowed rolls broke loose and injured a Ryan longshoreman there, one Frank Palazzolo. Palazzolo, having sued Pan-Atlantic alleging both negligence and unseaworthiness, recovered judgment on a general jury verdict. This judgment we, in *Palazzolo* v. *Pan-Atlantic, supra*, and then the Supreme Court in affirming us, required Ryan to indemnify.

A majority of the Supreme Court held that in agreeing to perform all of the shipowners' stevedoring requirements the stevedoring contractor agreed to discharge "*foreseeable* damages resulting to the shipowner from the contractor's improper performance of these requirements." (Italics ours.) *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, at ——, 76 S. Ct. 232 at 235, footnote 3, and authorities there cited.

It is precisely this fact of foreseeability that differentiates the cases. In the direct performance of its contractual duty of proper stowage a stevedoring contractor is obviously chargeable with knowledge that improperly stowed cargo capable of rolling, moving, falling or propelling it-

self, might do so when the cargo is discharged, and thereby cause someone injury, which injury is directly traceable without any intervening factors to the original improper stowage. This is the *Ryan* case. But it is not the instant case. Here, a flimsy shelter built on deck for the convenience of longshoremen at one port, which it was negligent for the ship's officers not to have removed before docking at the second port, was permitted to remain in place by the ship's crew and was offered as a safe place to work to a longshoreman at the second port, thereby causing him injury.

This independent failure of duty by the ship could not have been reasonably foreseen by the stevedoring contractor. It was a negligent act of the ship alone not directly traceable to a breach of a duty to properly stow cargo.

The judgment below is affirmed.

LUMBARD, Circuit Judge (dissenting):

In my view this case is governed by *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956), affirming *Palazzolo* v. *Pan-Atlantic S. S. Corp.*, 211 F. 2d 277 (2 Cir. 1954). Since there was evidence in the record to support a jury finding that it was the active negligence of Nacirema which caused the plaintiff's injury, the direction of a verdict for Nacirema was erroneous.

My colleagues do not deny that the evidence in this case would be sufficient to support a jury finding that the loose boards were placed upon the winch shelter by Nacirema's longshoremen in New York. Nor do I understand them to deny that under the contract between Nacirema and Weyerhaeuser, Nacirema had a duty to perform its loading and unloading operations in a reasonably safe and workman-

like manner and an obligation to indemnify Weyerhaeuser for any injury to it resulting from the negligent conduct of the unloading and loading operations. Indeed this much indisputably follows from the *Ryan* case.

The majority seeks to distinguish the *Ryan* case by arguing that here Weyerhaeuser was guilty of intervening active negligence in failing to tear down the shelter upon leaving New York, and that this negligence by Weyerhaeuser absolves Nacirema of responsibility. The majority seems to employ this argument in two ways. First, it is argued that Nacirema's negligence was not a proximate cause of the injury to Connolly because it was not foreseeable that Weyerhaeuser would fail to remove the shelter before the ship reached Boston. Second, it is argued that even if Nacirema's negligence was a proximate cause of the accident, Weyerhaeuser is barred from recovering indemnity because it was guilty of independent active negligence which contributed to the injury.

Let us assume with the majority, that Weyerhaeuser was guilty of negligence as a matter of law in failing to tear down the shelter. Such negligence is not implicit in the jury's verdict in favor of Connolly since that might well have been based on Weyerhaeuser's failure to detect the negligent construction of the shelter rather than its failure to tear it down upon leaving New York. But all of the testimony in the case indicates that it was the custom to remove such shelters upon leaving port and that it was dangerous to leave them standing when the ship went to sea.

But merely because Weyerhaeuser was guilty of intervening negligence, it does not necessarily follow that the chain of causation was broken between Nacirema's negligence and the injury to the longshoreman. Where a person negligently creates a risk of harm, he is not ordinarily

permitted to escape liability merely because he assumed that someone else would, in the performance of an independent duty, terminate or protect against the risk which he created. Cf. Restatement of Torts §§ 447, 452. But even if we assume that Nacirema was entitled to rely on Weyerhaeuser's tearing down the shelter, and even if we assume that it was unforeseeable that Weyerhaeuser might fail in this duty, it does not follow that Nacirema was guiltless of negligence which caused the injury. Nacirema had a continuing duty to use in its work reasonably safe equipment and reasonably safe methods. When it commenced unloading in Boston its employees presumably discovered and used this structure which had been constructed by its employees in New York. Even if the risk resulting from the negligence in New York had ended, a new risk arose when Nacirema began to use in Boston the negligently constructed shelter. Merely because the shelter had been allowed to stand while the ship traveled from New York to Boston it does not follow that it in some way became a part of the ship so that responsibility for it passed over from the stevedore to the shipowner. It was still a piece of equipment supplied by the stevedore for use in its work, and responsibility for its dangerous condition rested primarily on the stevedore. Therefore I cannot agree that a jury could not have found that Nacirema's negligence was a proximate cause of the accident.

Nor am I convinced that Weyerhaeuser was guilty, as a matter of law, of active negligence such as would bar indemnity. I have assumed that Weyerhaeuser was guilty of negligence in failing to dismantle the shelter upon leaving New York. I am willing to admit also that this negligence was active negligence. It does not follow, however, that this active negligence was a proximate cause of the injury to Connolly.

Weyerhaeuser's duty to tear down the shelter was quite unrelated to the defectiveness of the shelter or to the risk resulting from its dangerous condition. The custom was to tear down all such shelters, defective or not, because it was dangerous to have such structures on a ship at sea. The testimony was that high winds at sea might blow them down causing a risk of injury from flying timbers. If the plaintiff here had been a seaman injured in this manner while on the voyage, I have no doubt that Weyerhaeuser would be liable for its negligence in leaving the shelter standing.

In this case, however, Connolly's injury did not occur at sea and did not result from the risk created by Weyerhaeuser's breach of its duty to tear down the shelter. Suppose, for example, that Weyerhaeuser had removed the shelter upon leaving New York and had handed it over to the stevedore upon arriving in Boston. Weyerhaeuser would not then be guilty of any active negligence, but if the stevedore had continued to use the shelter the accident would still have happened.

It is true that Weyerhaeuser had the additional duty of providing the longshoremen with a safe place to work and that the jury has properly found it liable for a breach of this duty. But insofar as Weyerhaeuser is liable only for allowing Nacirema to use an unsafe shelter, its negligence is passive, not active. Its negligence in this respect is comparable to the negligence of the shipowner in the *Ryan* case. There the owner had a duty to supervise and inspect the loading of the cargo. This duty was nondelegable and the shipowner was held liable for failing to perform it. But the Supreme Court held in the *Ryan* case that this negligence did not bar indemnity from the stevedore which was primarily responsible for the loading. In the same manner Weyerhaeuser's failure to inspect the shelter used

by Nacirema does not bar it from recovering indemnity for injuries resulting from Nacirema's failure to use proper equipment.

The district court should have left the issue of Nacirema's liability to the jury. We should, therefore, reverse and remand for that purpose.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of September one thousand nine hundred and fifty-six.

Present:

HON. HAROLD R. MEDINA,
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

WILLIAM CONNOLLY,
Plaintiff,

v.

WEYERHAEUSER STEAMSHIP COMPANY,
Defendant-Appellant,

NACIREMA OPERATING CO. INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

WILLIAM CONNOLLY,

v.

WEYERHAUSER STEAMSHIP COMPANY

NACIREMA OPERATING CO.

350

JUDGMENT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED SEP. 11, 1956

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 75

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

vs.

NACIREMA OPERATING CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

WEYERHAEUSER STEAMSHIP COMPANY, *Petitioner,* *vs.* NACIREMA OPERATING CO., INC., *Respondent.*	No. 75

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

No opinion was rendered in the District Court.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 236 F. 2d 848 and is printed at pages 118-127 of the Record.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 11, 1956 (R. 127, 128). Timely petitions for rehearing and for rehearing in banc filed on September 20, 1956 were denied on November 5, 1956 (R. 128, 129). The petition for a writ of certiorari was filed on February 2, 1957 and granted on March 11, 1957, 352 U. S. 1030. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Questions Presented

1. Whether a shipowner is entitled to a jury determination of issues of fact in its claim for indemnity against a stevedore, in an action originally brought by a longshoreman employee of the stevedore against the shipowner for personal injuries, sustained when he was struck by a board which fell from a shelter constructed at a prior port by the same stevedore for the exclusive benefit of its longshoremen.

2. Whether a shipowner is entitled to indemnity from a stevedore by reason of the stevedore's negligence in maintaining and using a shelter built by the stevedore, for the sole benefit of the stevedore's longshoremen employees, in a case where a longshoreman recovered damages from the shipowner for personal injuries sustained by reason of the stevedore's use of the shelter in a dangerous condition.

Constitutional Provision Involved

The Seventh Amendment to the Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT

Action was originally brought in this case by William Connolly, a resident of Boston, Massachusetts (R. 5) against petitioner, Weyerhaeuser Steamship Company, a Delaware corporation (R. 6) by reason of personal in-

juries sustained while he was employed as a longshoreman by respondent, Nacirema Operating Co., Inc., a New York corporation (R. 10) on board petitioner's vessel, the SS F E WEYERHAEUSER at Boston, when a piece of board fell on his head while he was working in a lower hold. Jurisdiction was based upon diversity of citizenship of the parties, the amount in controversy being in excess of $3,000 (R. 6).

Petitioner filed a third-party complaint against respondent claiming right of indemnity in the event that it should be held liable to Connolly (R. 10-13).

Jury trial was had before Judge McGohey in the Southern District of New York. At the conclusion of the testimony, petitioner moved for a directed verdict in its favor against respondent. Decision on this motion was reserved. The Court then submitted to the jury only the case of Connolly against petitioner, instructing the jury that the claim over of petitioner against respondent would be submitted to them following their disposition of the case as between the original plaintiff and petitioner (R. 103). The jury returned a verdict in favor of Connolly against petitioner on the first count of the complaint, based on negligence. It returned a verdict in favor of petitioner on the second count of the complaint, based on unseaworthiness. The trial judge then, surprisingly contrary to his earlier instructions (R. 103), directed the jury to return a verdict in favor of respondent against petitioner in the third-party action (R. 117).

Following these verdicts, petitioner moved that the verdict in favor of respondent be set aside and that judgment be entered in favor of petitioner against respondent. Motion was also made in the alternative for a new trial (R. 17-19). The trial court denied all these motions.

Judgment in favor of Connolly against petitioner has been paid and satisfied. An appeal was taken to the Court

of Appeals for the Second Circuit involving only petitioner's claim for indemnity from respondent. Judgment in favor of respondent against petitioner was affirmed by a divided court (R. 118-127).

The SS F. E. WEYERHAEUSER is a Liberty ship, owned and operated by petitioner. She had carried a full cargo of lumber, including a deck load, from the West Coast to New York and then Boston. Discharge of cargo at both New York and Boston was performed by respondent under a standard form of stevedoring contract. The contract provided that respondent would "faithfully furnish" stevedoring services as required by the shipowner and furnish "foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work." The whole reach of the vessel's deck, holds and cargo equipment were turned over to and came under the control of the stevedore for cargo operations (R. 65, 66, 85, 99-101). The deck load and part of the underdeck cargo was discharged at Brooklyn, New York commencing January 25, 1952. The vessel left New York on January 30, 1952 and proceeded to Boston where she arrived on the afternoon of Thursday, January 31.

Discharge of cargo commenced at Boston on the afternoon of January 31st and continued through February 1st, 2nd, 3rd and 4th. The weather at Boston was reasonably good until February 4th, although there was slight precipitation on Saturday, February 2nd. Winds varied from force 1 to 3 on the Beaufort scale and were recorded in the ship's log on Monday, February 4th, at force 2. There was persistent rain on February 4th from the early morning hours.

Four gangs of longshoremen came on board at eight o'clock Monday morning, February 4th. Plaintiff, one of the longshoremen, was working at the bottom of No. 1 lower hold. At about ten o'clock in the morning he was

struck on the head by a piece of wood, which appeared to be a piece of dunnage four or five feet long, eight inches wide and one inch thick (R. 34, 37).

There were no eye-witnesses to the accident among the ship's personnel. The accident was reported to the acting second mate, who on the same date noted the following entry in the ship's log:

> "1000 Piece of wood from winch drivers shelter (built by them) #1 Hatch fell into #1 LH hitting longshoreman William J. Connolly on head. Hatch tender Pat Devine. Man sent out of hold on stretcher. No ship's gear involved in any manner." (Defendant's Exhibit "C", R. 84):

There was testimony from a number of the longshoremen, including the two winch drivers assigned to No. 1 hatch, that at the time of the accident no actual handling of lumber with ship's gear was being performed at that hatch. They said that the only possible place from which the piece of lumber could have come was from the top of a temporary shelter (R. 33, 49, 50) which had been erected over the winches solely for the winch drivers' own convenience and to protect them from the weather (R. 27, 28, 55, 59, 62, 86). They testified that this shelter was made of scrap lumber, nailed together, with a tarpaulin nailed over the top of it. Immediately after the accident, one of the winchmen climbed up on a winch so that he could look at the top of the shelter, which was some seven feet above the deck (R. 28, 34). He then saw a second tarpaulin over the first one. The second tarpaulin was not nailed down but had on it two boards of the same description and dimensions as the one that struck plaintiff (R. 34-37).

The Boston longshoremen insisted that although it was unusual, some of them said unknown, for a ship to come

into a port with longshoremen's shelters already erected, that, nevertheless, this ship did have four such shelters in place when it arrived at Boston four days prior to the accident. They said that although they had arrived prepared to erect a shelter, they had done nothing in connection with construction of this particular shelter and that they had not even examined it carefully or at all (R. 45, 56).

The shelter was not part of the equipment to be supplied by the ship under the terms of the contract (R. 65). It had nothing to do with the working of the ship or its gear (R. 91, 92, 100, 101). Such shelters are built solely for the winch drivers' own personal convenience, are built by them and are always erected regardless of the weather (R. 41-43, 59). The testimony was that such shelters are always erected by longshoremen at all ports in this country, including New York (R. 27, 28, 59, 62, 63).

There was further testimony that upon leaving port it was customary for a ship's crew to tear down such shelters in the process of clearing up or "squaring away" the deck and making the vessel ready for sea. This is ordinarily done for the safety of the seamen in the performance of their duties of handling the vessel at sea and handling lines while making fast to a pier at the end of a voyage (R. 59-61).

The ship's officers specifically denied that any shelters were in place when the ship arrived at Boston. As to this, the jury was instructed that plaintiff's claim would fail unless the accident occurred as described by plaintiff's witnesses and that if the jury should find that the shelters were not in place when the ship arrived at Boston, verdict should be for the defendant (R. 105).

On the disputed evidence, therefore, the jury's verdict established as a fact that the shelter over the winchmen

at No. 1 hatch had been built prior to the ship's arrival at Boston (See R. 105).

There was undisputed testimony from the ship's officers that due to the deck load of lumber it would have been physically impossible for the shelter to have been erected until after discharge of deck cargo at New York (R. 70, 71, 88, 89, 94, 95). As already noted, there was testimony that such shelters are erected at all ports, and it is undisputed that the longshore work at New York, as well as at Boston, was done by respondent, pursuant to the same contract.

There was further undisputed evidence that although strong winds were encountered by the ship on its voyage from New York to Boston the shelter itself could have survived (R. 77, 78).

The instructions of the trial judge and the verdict of the jury have further established that the ship itself and all its appurtenances were seaworthy, that the shelter was not an appurtenance of the ship, but that petitioner was negligent in failing to inspect the shelter and to make sure that there was no loose material on it which could fall from it in such a way as to endanger the longshoremen (R. 105, 106).

The majority of the Court of Appeals, although finding that there was sufficient evidence that the shelter was built by respondent at New York in a careless manner, distinguished the case from *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp.*, 350 U. S. 124, by concluding that it was not foreseeable that respondent's improper performance of its duty as a stevedore at New York would result in an injury to a longshoreman at Boston. Judge Lumbard dissented on the grounds that it did not necessarily follow that the chain of causation was broken by petitioner's failure to tear down the shelter at sea; that in any event respondent had a continuing duty at Boston to use in its work reason-

ably safe equipment and reasonably safe methods; that a new risk arose when respondent began to use in Boston the negligently constructed shelter; that responsibility for the dangerous condition rested primarily on the stevedore; that insofar as petitioner was liable only for allowing respondent to use an unsafe shelter its negligence was passive and not active, and that such negligence is comparable to the negligence of the shipowner in the *Ryan* case. It is Judge Lumbard's opinion that in any event the trial judge should have left the issue of respondent's liability to the jury (R. 124-127).

SUMMARY OF ARGUMENT

1. There was substantial evidence that the injuries to a longshoreman, for which petitioner has been held responsible to the longshoreman, were proximately caused by the active negligence of the stevedore-respondent as the primary wrongdoer. Petitioner was at least entitled to a jury determination of the causation issues. *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521.

2. Respondent was primarily at fault in erecting, maintaining and using in its work, solely for its own benefit, a dangerous structure. Petitioner, held liable to one of respondent's employees for injuries caused by this dangerous condition, is entitled to indemnity from respondent for respondent's breach of contractual duty to perform its work properly and safely. *Ryan Stevedoring* v. *Pan-Atlantic SS Corp.*, 350 U. S. 124. On the law and the uncontradicted evidence, there was error not only in the direction of a verdict against petitioner but also in the denial of motion for directed verdict in favor of petitioner.

POINT I

PETITIONER HAS BEEN DEPRIVED OF ITS CONSTITUTIONAL RIGHT TO A JURY TRIAL BY THE DIRECTION OF A VERDICT FOR THE RESPONDENT.

On the basis of the evidence, the Trial Judge's charge, and the jury's verdict against the shipowner, it must be assumed that respondent, petitioner's contracting stevedore, erected a shelter over the ship's winch at New York; that this shelter was supplied by the stevedore solely for use in connection with the performance of stevedore work; and that the shelter was unsafe. Similarly it must be assumed that the jury in finding the shipowner negligent, found as a fact that the winch drivers' shelter was not demolished by the ship's crew after leaving New York; that it was on the ship upon her arrival at Boston, and that respondent's longshoremen used this shelter in connection with their stevedoring operations.

The instructions of the Court and the verdict of the jury have further established that the ship itself and all its appurtenances were seaworthy and that the shelter was not an appurtenance of the ship.

There is no dispute in this case that the shelter was built by longshoremen and was used for their exclusive benefit. The longshoremen and ship's officers and plaintiff's expert seamen all agreed on this. Shelters are regarded as a nuisance by the ship's officers and, on occasion, the chief officer had asked longshoremen not to build them (R. 101). The universal practice of building such shelters at every port, however, continued. The personal use of such shelters is confirmed by the jury's verdict in favor of petitioner on the ground of unseaworthiness, for on the testimony and the Court's charge, the verdict necessarily imports a find-

ing that the shelter was not an appurtenance of the ship (R. 106).

It is also clear that the shelter was within respondent's exclusive control. This is shown by the testimony referred to above and the fact that the ship's officers had no duties in connection therewith during cargo operations. While it is true that a ship's officer remained in charge of the ship as a whole and made occasional rounds to see that cargo operations in general were being properly performed, and while it was occasionally necessary for ship's personnel to oil winches, the safety and seaworthiness of the ship and care and custody of cargo did not require inspection of such a temporary shelter, and none was made.

It further follows that employees of respondent constructed the shelter. Accepting the jury's verdict that the shelter was not built at Boston, it could only have been built by respondent at New York. Such shelters are never built by ship's personnel but are always built by longshoremen. It could not have existed, by reason of the deck load, prior to arrival of the ship at New York and respondent did the stevedoring work at New York (R. 70, 71, 88, 89, 94, 95).

In addition, the only contemporary record in this case, the ship's log, states unequivocally that the shelter was built by the longshoremen (R. 84).

At the trial, counsel for respondent argued that, assuming the truth of the foregoing, there was no evidence as to how the board which struck plaintiff happened to be placed on top of the shelter. As to this, we submit that counsel for respondent was clearly wrong. Plaintiff's evidence tended to show that the board was placed on top of the shelter to hold down a tarpaulin which was loose and supplemental to one nailed in place (R. 34, 49). Clearly, the board was not carelessly thrown up on the shelter to get it out of the way. It was there for a purpose, and it

was there to hold down the loose tarpaulin along with the other two boards. As to this, the longshoremen and the ship's officers all agree that the ship never furnished such a tarpaulin (R. 42, 92, 93, 102). On the contrary, tarpaulins are brought on board or specially obtained by the longshoremen themselves for the purpose (R. 42, 92, 93, 102). It is inconceivable and there was no testimony that a ship's crew would store a small, spare tarpaulin by placing it on top of a flimsy shelter seven feet off the deck and leave it there unfolded and unsecured other than by the weight of three small boards. The master testified that, in fact, the crew did not (R. 82). There can be no doubt that the loose tarpaulin was placed in position by respondent's employees either at Boston or New York and that it was weighted down by the longshoremen.

There is no finding and no evidence as to just when the loose board was placed on the shelter, and, in view of the testimony of the respondent's winchmen, there could be no direct evidence on the point. If the loose tarpaulin was placed in position at Boston, it must have been done by respondent's employees. If it was not placed there at Boston, it must have been put in place at New York, and again, by respondent's employees. This follows as a necessary conclusion from the established facts.

The dangerous situation which resulted in plaintiff's injuries could only have been directly caused by the negligence of respondent's employees in erecting, maintaining and using for their sole benefit a flimsy and dangerous structure.

There was, therefore, substantial evidence in support of the following propositions:

a) The instrumentality that caused the accident was constructed by respondent, was used solely for its benefit and was in its exclusive control.

b) Respondent was negligent in using the shelter at Boston without so much as a casual inspection to ascertain its condition,

c) The primary obligation to furnish the longshoremen a safe place to work rested upon their employer, the respondent,

d) Negligence found on the part of petitioner was merely for breach of a "non-delegable duty" and was passive in nature,

e) The active or primary negligence which caused the accident was solely that of respondent.

These issues were matters for the jury. To deny petitioner at least a jury determination as to the nature of the stevedore's negligence and of the issues of causation was an extreme departure from precedent. In *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, involving a stevedore's obligation to indemnify a shipowner, the New York Court of Appeals said:

> "Where several tort-feasors are involved an implied contract of indemnity arises in favor of the wrong-doer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent. * * * Whether negligence is passive or active is, generally speaking, a question of fact for the jury" (p. 328).

See also *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521; *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523; and see *Seawright* v. *A. Garcia y Cia, Ltda.*, (E. D. Pa. 1956) 138 F. Supp. 881, where it was said at page 884:

> "Without a further jury determination it is impossible to ascertain at this time whether such negligence on the part of the shipowner constituted primary or secondary, active or passive tortious conduct, * * *."

POINT II

PETITIONER SHOULD BE INDEMNIFIED FOR THE LOSS RESULTING FROM RESPONDENT'S BREACH OF CONTRACTUAL OBLIGATION TO DO THE STEVEDORING PROPERLY AND SAFELY.

The verdict for petitioner on plaintiff's count of unseaworthiness has established the fact that the ship was herself seaworthy and, as such, was a safe place in which to work. Creation of a condition constituting an unsafe place to work was, on the jury's findings, solely due to the unsafe condition of the winch shelter. This was erected by respondent's employees after control of discharging operations was turned over to this independent contractor.

It matters not whether the shelter was erected by respondent's longshoremen at New York or at Boston, because this structure was built by and solely for the use of respondent's employees in the course of their work and, even if built by them at New York, it was adopted again by them at Boston. It was not an appurtenance of the ship, it was not a part of the equipment to be furnished by the ship under the stevedoring contract (R. 65) and it can not be considered as having been furnished by petitioner to respondent.

Since petitioner was under a non-delegable duty to furnish a safe place for the longshoremen to work, and although the ship was safe but for respondent's erection of an unsafe structure, the jury found, on the Court's instructions, that petitioner was negligent in that the ship's officers took no affirmative steps to inspect it and to see that it was in all respects secure. As to this, the Trial Court summarized in its charge to the jury as follows:

> "Going back for a minute to the negligence against the ship you would have to find, for instance, that they had an opportunity to see that structure,

that they did see it and they took no steps to make it fast and to keep that wood down there." (R. 106).

As this shelter was unsafe, it necessarily follows that the direct cause of the accident was the active negligence of respondent in the construction, maintenance and use of the shelter.

In these circumstances petitioner is entitled to indemnity from respondent by reason of breach by respondent of its contractual obligation to do its work in a safe manner. *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp.*, 350 U. S. 124, 133.

The present case parallels very closely the circumstances of the *Ryan Stevedoring* case. In *Ryan*, the same stevedoring company loaded a vessel at one port and discharged it at a second port. The stowage was negligent by reason of failure to properly chock rolls of paper pulp, and this negligence was the direct cause of an injury to a longshoreman who was caught by one of the rolls of paper in the course of discharge. There was further evidence that the stowage and the discharge was under the general supervision of the ship's officers.

The shipowner, although held liable to the longshoreman, was, nevertheless, held entitled to indemnity from the stevedore for the latter's breach of its warranty of workmanlike service which was of the essence of the stevedoring contract.

In the present case, if the loose tarpaulin and hold-down boards were placed in position at Boston, the liability over of respondent is obvious. If the board was not placed on the shelter at Boston, then it was placed there at New York, and we then have the exact *Ryan Stevedoring* situation: a negligent act by the stevedore at one port, which created a dangerous situation and directly caused an injury to a longshoreman employee of the same stevedore at a second port, with the shipowner held responsible in the

first instance under its non-delegable duty to the longshoreman in respect of a condition created by the stevedore's active negligence.

In the majority opinion of the Court of Appeals, the *Ryan Stevedoring* case is differentiated on the theory that in performance of the shipowner's stevedoring requirements it was implicit that the stevedoring contractor agreed to indemnify the shipowner only for "foreseeable damages resulting from the contractor's improper performance of these requirements". We submit that the case is not distinguishable on this ground and that the *ratio decidendi* is the same. Judge Lumbard in his dissenting opinion agrees that the case at bar is, in fact, governed by *Ryan*.

In the first place it seems clear that the matter of "foreseeable damages" is one which should have been submitted to the jury. *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521. In addition there was no breach of any duty owed by petitioner to respodent with respect to the removal of the shelter. Shelters are torn down at sea by reason of danger to members of the crew rather than by reason of any ultimate danger to longshoremen at a subsequent port, who, in the ordinary course of things, would be expected to rebuild the shelter at the next port (R. 59, 60). As between petitioner and respondent, there was no actionable negligence on the part of petitioner. Furthermore, as stated by Judge Lumbard,

> "Where a person negligently creates a risk of harm, he is not ordinarily permitted to escape liability merely because he assumed that someone else would, in the performance of an independent duty, terminate or protect against the risk which he created. Cf. Restatement of Torts §§ 447, 452." 236 F. 2d 848, 852 (R. 125).

The test of foreseeability applied in the majority opinion of the Court of Appeals is entirely inapplicable to the

active negligence of respondent in using the unsafe structure at Boston without so much as a casual inspection to ascertain its condition. A new risk arose at that time and any possible prior negligence of petitioner must be regarded, as between the present parties, as a condition rather than a cause.

Again, as in the *Ryan* case, it is unnecessary to consider the line of authorities which support the right of indemnity on the common law concepts of primary and secondary or active and passive tortious conduct. We have here the same contractual obligation of the stevedore to perform its work in a safe manner and a resulting right of indemnity for breach of this contractual obligation. The right of indemnity furthermore is not defeated by any obligation of the shipowner to supervise the cargo work or right to require correction of any unsafe practice. As to this, this Court said:

> "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach." (350 U. S., at pages 134, 135).

On the undisputed facts and on the applicable law, petitioner is entitled to indemnity from respondent.

In this brief we have pointed out that on the law and on the evidence petitioner was entitled at least to a jury determination of the issues under its claim for indemnity and that the Trial Court erred in directing the verdict in favor of respondent as against petitioner. We further submit that on the law and on the undisputed evidence the Trial Court

not only erred in directing a verdict against petitioner, it also erred in denying petitioner's motion for a directed verdict against respondent. The only conflict in the evidence was whether the winchman's shelter was constructed before or after the vessel arrived at Boston. This conflict having been resolved by the jury verdict, no dispute in the testimony remains. While it is ordinarily the province of the jury to draw such inferences as are necessary from the evidence before it, in the present case only one rational inference could have been drawn: that respondent's breach of duty was the sole proximate cause of the accident.

CONCLUSION

The judgments of the United States Court of Appeals for the Second Circuit and of the District Court of the United States, Southern District of New York, should be reversed and the case should be remanded to the District Court with direction that judgment be entered in favor of petitioner against respondent. In the alternative a new trial should be granted petitioner on its third-party complaint against respondent.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 75

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

vs.

NACIREMA OPERATING CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

WEYERHAEUSER STEAMSHIP COMPANY, *Petitioner*, *vs.* NACIREMA OPERATING CO., INC., *Respondent*.	No. 75

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

Respondent's brief is based fundamentally on two erroneous conceptions which are repeated on nearly every page.

Respondent asserts that petitioner had actual knowledge of the defective condition of the winchman's shelter and it also states that petitioner "offered" or "furnished" the shelter to respondent and in so doing impliedly warranted that it was in seaworthy condition, that is, fit for the purpose and not dangerous to personnel.

As to the matter of knowledge, respondent's brief contains no single reference to the record. In fact there is not a scintilla of evidence in this case that any member of the ship's complement had any knowledge of the unsafe condition of the shelter. Constructive notice is not actual knowledge, and the cases cited by respondent make it abundantly clear that it is actual knowledge which may bar a right to indemnity under the laws of New York and other jurisdictions.

As to the contention that respondent was the beneficiary of an implied warranty, it has been demonstrated on page

13 of our principal brief that the factual situation was not consistent with the existence of any such implied warranty for the reason that the shelter cannot be considered as having been furnished by petitioner to respondent.

We submit, furthermore, that respondent is precluded by the verdict of the jury from now maintaining that the shelter was "offered" to it. On the negligence count, on which the jury returned a verdict for plaintiff Connolly, the court charged the jury that they would have to find that petitioner had an opportunity to see the shelter, that it did see it, and that it took no steps to make it fast and keep the piece of dunnage in place (R. 106). As to unseaworthiness, however, the Court said (R. 106):

> "Now, I have said that seaworthiness means that the gear and the ship itself and its appurtenances must be fit for the job that they are used for. Whether or not this shelter constitutes one of those fittings is for you to determine and to find from all the facts whether that was an appurtenance of the ship and whether or not its condition rendered the ship unseaworthy."

As the uncontradicted evidence has established that the shelter was not safe, it necessarily follows that the jury found that the shelter was not an appurtenance of the ship. Its verdict in favour of petitioner on the unseaworthiness count has therefore established that there was no breach of any implied warranty from petitioner to the longshoremen.

Under *Seas Shipping Co.* v. *Sieracki* (1946), 328 U.S. 85, relied upon by respondent, there is much stronger ground for arguing that there was a warranty in favor of plaintiff Connolly, the longshoreman, than there is for arguing that there was a warranty in favor of the respondent stevedoring company. In fact, respondent evidently treats a warranty in favor of longshoremen, and a warranty in favor of respondent employer-stevedore as one and the

same thing. Respondent's present contention, therefore, that petitioner breached a warranty in respondent's favor, is not only completely inconsistent with but is negatived by the jury verdict.

Another glaring error is reiterated in respondent's brief. At page 13 respondent's brief states:

> "So far as the claimed breach of contract is concerned, there were two contracts involved here and petitioner does not make it clear which contract he claims was breached."

And at page 14 respondent's brief states:

> "The contract to unload at Boston made by respondent with petitioner was separate and distinct from the contract made at New York."

The record is to the contrary. The testimony of Captain Dantzler, vice-president of respondent (R. 63-67), during which pertinent portions of the single stevedoring contract were read to the jury, conclusively indicates that there was but one contract covering all stevedoring work done by respondent for petitioner, both at New York and at Boston. The contract itself was marked for identification as Exhibit A (R. 65). The document was excluded from evidence because of respondent's objection that portions of it (relating to insurance) were "irrelevant".

Conclusion

The judgment appealed from should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~741~~ 75

WEYERHAEUSER STEAMSHIP COMPANY,

Petitioner,

against

NACIREMA OPERATING CO., INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 741

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

aaginst

NACIREMA OPERATING CO., INC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Questions Presented

1. Whether the District Judge has power to direct a verdict where there is insufficient evidence to support the claim.

2. Whether there is sufficient evidence in this record to warrant submission to the jury of the issue of the shipowner's right to indemnity against the stevedore, where the shipowner itself has been held liable to the plaintiff because of its independent, affirmative negligence.

Statement

The plaintiff in the main action, a stevedore in the employ of Nacirema Operating Co., was injured on board the Liberty Ship "F. E. Weyerhaeuser" in Boston Har-

bor, when a piece of lumber fell from a shelter erected over the winches at number 1 hatch, and struck him (31, 32*).

There was unanimous agreement among the witnesses that shelters such as the one from which the piece of lumber fell are erected by longshoremen in all harbors of the United States as a protection for the winchmen against the weather. They are temporary structures constructed of ship's dunnage with a tarpaulin roof, the tarpaulin being furnished by the ship or taken from the longshoremen's gearhouse (52, 53). The particular shelter involved in this case, in addition to its tarpaulin roof, had a piece of loose tarpaulin and some pieces of loose lumber thrown on top (51).

It was the testimony of the plaintiff's witnesses that the shelter on the vessel Weyerhaeuser was already there when the ship docked in Boston Harbor (50). Implicit in the jury's verdict in favor of the plaintiff is a finding that such was the fact, and a further finding that the ship had an opportunity to see, and did see, the shelter before the plaintiff's accident and failed to make it secure. For the Court had specifically instructed the jury that the plaintiff could not recover in negligence unless it found that the shelter was in place when the ship docked, and that the ship had an opportunity to see, and did see, the structure and failed to make it secure. The instructions on that point were as follows:

> "Now, if you find from the evidence that the structure, that is, this shelter, was on the ship when it came into Boston Harbor and that the ship offered it to the stevedores to use and work with, and if you find that in permitting that to be there the ship was guilty of some act of negligence as I have defined it to you, then you could find a verdict for Mr. Connolly.

---

* Page references are to Petitioner's Appendix.

But if you find that the shelter was not on that ship as he claims, or if you find that the accident did not happen as he claims it happened, then on this issue of negligence you would have to bring a verdict for the ship. * * *

"Going back for a minute to the negligence, in order to find negligence against the ship you would have to find, for instance, that they had an opportunity to see that structure, that they did see it and that they took no steps to make it fast and to keep that wood down there." (118, 119)

There was testimony in the plaintiff's case that shelters erected by longshoremen are taken down by the ship's crew, in every well run ship, as soon as it is made ready for its voyage (70, 71, 73, 75). This testimony was corroborated by the ship's own witnesses (85, 86). The captain of the vessel testified to the ship's responsibility for removing the shelters:

"Q. Just a few more questions, Captain. Assuming that shelters had been erected in New York, and assuming that they had been left on the vessel on its way to Boston, that would have been carelessness on the part of your shipmates, wouldn't it Captain? A. It would be carelessness on the part of myself and the chief mate.

Q. Well, it would be essentially carelessness on the part of the chief mate, wouldn't it. A. No, I would say that I would feel the responsibility very definitely * * *.

Q. Now, Captain, it is the chief mate's responsibility, if there were shelters on this vessel, to see that they were taken down; is that correct? A. I can't pin it down directly to the chief officer. It is all our responsibility." (93, 94)

The chief officer testified that it was his job to see that the shelters were taken down, and that, if the vessel reached Boston with the shelters still up, he would have been derelict in his duty (109).

The vessel had taken on parts of her cargo at Tacoma and Raymond in Washington, and had finished loading at Longview (81, 82). She then sailed to New York where part of her cargo was unloaded by employees of the respondent, Nacirema Operating Co. Inc. (84). The captain testified that there were no deck shelters up when the ship left Longview (83), and that there were no deck shelters standing when the ship entered Boston Harbor (92). He did not remember whether the longshoremen had erected shelters while the ship was being unloaded in New York (92), but the weather was so rough on the voyage from New York to Boston that, in his opinion, it would have been utterly impossible for a piece of loose tarpaulin and loose lumber to remain on the roof of the shelter during that voyage; the wind and the movement of the ship would have shaken them off (90). In that conclusion the chief officer concurred (105).

No one could, or did, testify when the particular shelter involved in this case was erected. From the established custom it could be inferred that it was erected by longshoremen at one of the ports at which the ship docked; but whether it was erected on the west coast or at New York would be a matter of speculation. There is no evidence at all as to when the loose pieces of lumber were thrown on top of the shelter. The inference that they were thrown there by the ship's crew is just as consistent with the evidence as the inference that they were put there by the longshoremen. Under such circumstances, it is the position of the respondent, Nacirema Operating Co., Inc., that the ship failed to produce sufficient evidence to warrant submission of the issue of its right to indemnity to the jury, and that the direction of the verdict by the Court, was, therefore, entirely proper.

Argument

1. THE DISTRICT COURT HAS POWER TO DIRECT A VERDICT WHERE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CLAIM.

There seems to be no room for argument that a District Court has power "to withhold or withdraw from the jury cases in which the claimant puts forward insufficient evidence to support a verdict". (*Galloway* v. *United States*, 319 U. S. 372, 373.)

2. THERE IS INSUFFICIENT EVIDENCE IN THIS RECORD TO SUPPORT A VERDICT IN FAVOR OF THE VESSEL ON ITS CLAIM FOR INDEMNITY.

The claim for indemnity here is based on two grounds: one, that the stevedore's active negligence was responsible for the plaintiff's accident and that the vessel was merely passively negligent; the other, that the stevedore breached its warranty of workmanlike service in the performance of its contract.

In dealing with the vessel's claim that it is entitled to indemnity at common law, it is not here necessary to argue the validity of the respondent's defense of workmen's compensation pleaded in its answer. The testimony is clear that the vessel was guilty of independent, affirmative negligence. Under the Court's instructions the jury necessarily found that the vessel had actual notice of the existence of the structure, and of its condition, and that it was negligent in failing to make it safe before turning it over for use by the stevedores in Boston. The fact that it did have notice effectively deprives it of any right to indemnity at common law. (*Schwartz* v. *Merola Bros. Const. Corp.*, 290 N. Y. 156; *Adler* v. *Tully and DiNapoli, Inc.*, 300 N. Y. 662; *Sheffield* v. *Yager*, 260 App. Div. 855, affd. 287 N. Y. 604; *Falk* v. *Crystal Hall Inc.*, 200 Misc. 979, affd. 279 App. Div. 1071; leave denied, 304 N. Y. 987.)

Further, the ship's officers admitted that it was an invariable custom at all harbors in the United States that these temporary shelters, erected by the longshoremen, be removed by the ship's crew when the ship made ready to sail, and that the failure of the ship's crew to remove the shelters constituted negligence. The longshoremen could not have anticipated the ship's failure to remove the shelters and certainly had a right to rely on the ship's discharging that duty in accordance with the custom. Even if it were a permissible inference that the longshoremen had not only erected a shelter in New York but that they had erected a defective shelter, the most that could be said is that they were joint tort feasors with the ship and so not liable for indemnity. (*Falk* v. *Crystal Hall Inc., supra.*)

In that connection it might be pointed out that there is no permissible inference from the evidence in this case that the lumber which fell and struck the plaintiff was put on top of the shelter by the longshoremen. The Court of Appeals, in the majority opinion, has held that it might be inferred from the evidence that the longshoremen at New York had erected the shelter, but that is as far as the inference could go. The lumber on top of the shelter was no part of its structure. The custom as to the erection of shelters might support the inference that the longshoremen at New York erected it, but it is not permissible to infer further from that inference that they piled the loose lumber on top. The inference that the lumber was put on top of the shelter by the ship's crew, to hold down the tarpaulin roof while the ship was encountering high winds on the way from New York to Boston, is as least as reasonable as the inference that it was put there by the longshoremen at New York. It is well established law that where evidence is susceptible of two inferences, one of which imposes liability on the defendant and the other of which exonerates him, that which exonerates him from liability must be accepted. (*Digelormo* v. *Weil,* 260 N. Y.

192, 200; *White* v. *Lehigh Valley R. R. Co.*, 220 N. Y. 131, 135.)

So far as the vessel's claim that the stevedore was negligent in using the shelter without inspection as concerned, there is positive evidence that the shelter looked all right and that the only way in which one could determine that there was lumber on the roof would be by climbing up on something to see what was on top (67). Casual inspection could not reveal that there was lumber on top, and casual inspection is all that was required of the stevedore. On this record it must be taken as established that the ship adopted the structure as its own and presented it to the longshoremen at Boston for their use. Under those circumstances it was under a duty to make such inspections as were reasonable to insure that the structure was safe. (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Gucciardi* v. *Chisholm*, 145 F. 2d 514.) Assuming that the vessel and the stevedore were alike derelict in their duty of inspection, they were at most joint tort feasors and neither was entitled to indemnity from the other for losses arising from a failure to inspect. (*Union Stockyards Co.* v. *Chicago, B. & Q. R. Co.*, 196 U. S. 217, 228.)

3. THE DECISION OF THE MAJORITY OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *Ryan Stevedoring Co.* v. *The Pan-Atlantic Steamship Co.*, 350 U. S. 124.

In the *Ryan Stevedoring* case the vessel was held entitled to indemnity because the stevedore had breached an essential term of the stevedoring contract. "It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product." What relevance that decision has to the instant case is not clear. The erection of the shelter on the ship, if it entered into the contract at all, entered merely as an incidental consideration and not

as a term or provision of the contract. As in all contracts, it must be assumed that both sides, in making the agreement, took into consideration the established customs of the harbor in so far as they affected the agreement. One of those customs was that stevedores, when loading and unloading ships, erect shelters for protection against the weather, and that the ship's crew removes those shelters before the ship leaves the harbor. The ship understood that the stevedores would erect shelters, and the stevedores understood that the ship would remove them. Neither contemplated that the shelters would be left standing and certainly the stevedores could neither foresee nor anticipate any such procedure. If the ship chose to allow these flimsy temporary structures to remain standing during the voyage from New York to Boston, subjected to the hazards of heavy weather, and furnished them to the stevedores for use, knowing, as the jury has found it did know, that the structure was defective, then the ship cannot look to the stevedores for indemnity. And there is nothing in the *Ryan Stevedoring* case, nor in any other case, which would furnish support for any such contention.

4. THERE IS NO PRINCIPLE OF LAW INVOLVED HERE WHICH HAS NOT ALREADY BEEN CONSIDERED BY THIS COURT, AND FINALLY SETTLED, NOR IS THERE ANY CONFLICT IN THE HOLDINGS OF THE DIFFERENT CIRCUITS WHICH WOULD JUSTIFY THE GRANTING OF THE WRIT IN THIS CASE.

The contractual right of a ship to indemnity from a stevedoring contractor has been carefully and thoroughly considered by this Court in several recent cases, and the applicable law well settled. The only question which remains—and it does not seem to be significant in the present condition of the record—is the question whether the provisions of the Longshoremen's and Harborworker's Act furnish a complete defense to the employing stevedore where the claim to indemnity by the vessel is based solely on

principles of common law indemnity. That question was left open in the *Ryan Stevedoring* case, but its determination is not essential to the disposition of the issues in the instant case. The only dispute here concerns the significance of the facts and that dispute does not merit a review by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 75

WEYERHAEUSER STEAMSHIP COMPANY,

Petitioner,

against

NACIREMA OPERATING CO., INC.,

Respondent.

RESPONDENT'S BRIEF

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IN THE

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No. 75

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

against

NACIREMA OPERATING CO., INC.,
Respondent.

RESPONDENT'S BRIEF

The Questions Presented

1. Whether there is sufficient evidence in this record to require submission to the jury of the issue of the ship owner's right to indemnity against the stevedoring contractor, where the ship owner itself has been held liable to the plaintiff because of its independent, affirmative negligence.

Statement

The plaintiff in the main action, a stevedore in the employ of respondent, Nacirema Operating Co., was injured on board the liberty ship "F. E. Weyerhaeuser" in Boston Harbor, when a piece of lumber fell from a shelter erected over the winch at #1 hatch, and struck him (R. 33).

The injured workman sued the ship owner, alleging negligence of the owner and unseaworthiness of the vessel.

The ship owner impleaded the workman's employer, claiming a right to indemnity at common law and under the provisions of the stevedoring contract.

The case was tried before Judge McGohey and a jury in the Southern District Court of New York. At the close of the entire case the trial court decided to make separate submissions to the jury of the issues involved in the main action and the issues raised by the cross-complaint. The issues in the main action were first submitted to the jury, which returned a verdict in favor of the plaintiff against the ship owner on the negligence count only, absolving the ship from the charge of unseaworthiness. Based upon the findings of fact necessarily implicit in the jury's verdict, the court directed a verdict in favor of the impleaded defendant against the ship owner.

The ship owner appealed to the Court of Appeals for the Second Circuit from the judgment in favor of the impleaded defendant only. That judgment was affirmed by a divided court. On petition by the ship owner, certiorari to this court was granted on March 11, 1957.

There was unanimous agreement among the witnesses that shelters such as the one from which the piece of lumber fell on the plaintiff are customarily erected by longshoremen in all harbors of the United States as a protection for winchmen against the weather. They are temporary structures constructed of ship's dunnage with a tarpaulin roof, the tarpaulin being furnished by the ship or taken from the longshoremen's gear house (R. 42). The particular shelter involved in this case, in addition to its tarpaulin roof, had a piece of loose tarpaulin and some pieces of loose lumber thrown on top (R. 35).

The shelter was about seven feet high and four or five feet wide (R. 28), and what was on top of the shelter could not be seen from the deck level (R. 35).

It was the testimony of the plaintiff's witnesses that the shelter was already erected when the ship docked in Boston (R. 40). Implicit in the jury's verdict in favor of the plaintiff is a finding of fact that such was the case, and a further finding that the ship had an opportunity to see, and did see, the shelter before the plaintiff's accident and failed to make it secure. For the court had specifically instructed the jury that the plaintiff could not recover in negligence unless the jury found that the shelter was in place when the ship docked, and that the ship had an opportunity to see, and did see, the shelter and failed to make it secure. The instructions on that point were as follows:

> "Now, if you find from the evidence that the structure, that is this shelter, was on the ship when it came into Boston Harbor and that the ship offered it to the stevedores to use and work with, and if you find that in permitting that to be there the ship was guilty of some act of negligence, as I have defined it to you, then you could find a verdict for Mr. Connolly. But if you find that the shelter was not on that ship as he claims, or if you find that the accident did not happen as he claims it happened, then on this issue of negligence you would have to bring in a verdict for the ship.
>
> * * * * * *
>
> "Going back for a minute to the negligence, in order to find negligence on the ship you would have to find, for instance, that they had an opportunity to see that structure, that they did see it and that they took no steps to make it safe and to keep that wood down there." (R. 104, 106)

There was testimony in the plaintiff's case that shelters erected by longshoremen are taken down by the ship's crew, in every well run ship, as soon as it is made ready for its voyage (R. 59, 60). This testimony was corroborated by the ship's own witnesses, who testified in addition that

failure of the ship's personnel to remove the shelters before the ship got under way, would involve a dereliction in the performance of their duties (R. 73, 80). The testimony of the ship's captain in that regard was as follows:

"Q. Captain, you heard the witness yesterday, an able bodied seaman, who testified with respect to the custom at sea of disposing longshoremen's shelters such as this, did you not? A. Yes, sir.

Q. Do you agree with what he stated as to the custom carried out at sea with regard to the disposition of these shelters as part of making the ship ready for sea? A. Absolutely.

Q. Is that an invariable order on board your ship that that shall be done? A. Always.

* * * * * *

Q. Just a few more questions, Captain. Assuming that shelters had been erected in New York, and assuming that they had been left on the vessel on its way to Boston, that would have been carelessness on the part of your shipmate, wouldn't it, Captain? A. It would be carelessness on the part of myself and the chief mate.

Q. Well, it would be essentially carelessness on the part of the chief mate, wouldn't it? A. No, I would say that I would feel the responsibility very definitely.

* * * * * *

Q. Now, Captain, it is the chief mate's responsibility, if there were shelters on this vessel, to see that they were taken down, is that correct? A. I can't pin it down directly to the chief officer. It is all our responsibility." (R. 73, 80, 81)

The testimony of the chief officer on the same subject was as follows:

"Q. Now, Mr. Kern, if there were shelters on when the vessel reached Boston, actually that would mean

that you would have been derelict in your duty. A. I wouldn't be working any more.

Q. Isn't that what it amounts to, that your job is to see that these shelters are taken down; is that correct? A. That is correct.

Q. And if they were on when the vessel reached Boston, it would have meant that you were derelict in your duty? A. Correct." (R. 95, 96)

The vessel had docked at New York with a full cargo of lumber, and was partially unloaded there by employees of the respondent. No one could, or did, testify when the particular shelter involved in this case was erected. The jury's verdict has established as a fact that it was erected before the ship docked at Boston, and the opinion of the Court of Appeals states that there was sufficient evidence to justify an inference by the jury that the shelter was erected by respondent's employees at New York. There is no direct evidence, and it is submitted no evidence from which an inference can be drawn, that the boards which fell on the plaintiff were placed on top of the shelter by respondent's employees. The inference that they were put there by the ship's crew during the voyage from New York to Boston to keep the tarpaulin from being blown away by the wind was at least as probable as the inference that they were originally placed there by the longshoremen when they built the shelter.

Based upon the evidence and upon the findings of fact which are implicit in the jury's verdict, it is the respondent's position that the ship owner did not make out a cause of action for indemnity, either at common law or by contract, and that a verdict in favor of the respondent was, therefore, properly directed by the trial court.

Summary of Argument

1. The verdict of the jury, reached in accordance with the instructions of the trial court, establishes that the ship was guilty of independent, affirmative negligence in furnishing to the stevedores at Boston a shelter which was defective, and which the ship knew to be defective. Giving the ship owner the benefit of every favorable inference that could be drawn from the evidence, consistent with the findings of fact made by the jury, the most that was established was that the ship owner and the stevedoring contractor were joint tort-feasors. At common law one joint tort-feasor has no right to indemnity against the other.

2. So far as the contractual relations between the petitioner and the respondent are concerned, the stevedoring contract in New York incorporated by reference the customs of the harbor with reference to stevedoring operations. One of these customs was that the stevedores erect temporary shelters and that these shelters are removed by the ship. If there was a breach of that contract, it was the ship's default in failing to conform to the custom and remove the shelters when the ship left the harbor. At Boston the ship owner presented the shelter to the stevedores for use, thereby warranting its safety. The worst that can be charged against the stevedores there is that they failed to discover that the shelter was unsafe. Since they had a right to rely upon the implied warranty of safety by the ship, their failure to discover that the shelter was unsafe was not such a violation of the stevedoring contract as would render their employer liable to indemnify the ship owner for injuries caused because a shelter which the ship owner warranted to be safe turned out to be unsafe.

ARGUMENT

POINT I

In the light of the jury's verdict, the evidence adduced was not sufficient to create an issue of fact as to the petitioner's right to indemnity at common law. The direction of a verdict on that count by the trial court was, therefore, proper.

The petitioner's contention that it was deprived of its constitutional right to a jury trial is in effect begging the question. If no issue of fact as to its right to indemnity survived the jury's verdict, then the trial court was obviously correct in directing a verdict in favor of the third-party defendant. (*Galloway* v. *United States*, 319 U. S. 372, 373). If an issue of fact as to its right to indemnity did survive the jury's verdict, then concededly it was entitled to go to the jury to have that issue of fact determined. And that is the whole problem which is involved on this appeal.

The petitioner on this appeal contends that it was entitled to go to the jury on its claim for indemnity at common law as well as under the provisions of its contract. The verdict of the jury in favor of the plaintiff in the main action would seem to bar effectively any right to indemnity by the petitioner against the respondent at common law.

The verdict of the jury, which must be assumed to have conformed to the court's instructions, establishes that the shelter was on the deck when the ship docked at Boston; that it was offered to the stevedores for use by the ship owner; and that it was defective and unsafe, and that the ship owner knew that it was defective and unsafe, because, under the circumstances, notice to the ship owner of the

defect was an essential prerequisite to liability. In addition, the jury must have found, as the ship's officers conceded, that the employees of the ship were negligent in failing to remove the shelter when they made ready for their voyage to Boston. The jury's findings convict the ship owner of negligence independent of, and entirely unrelated to, any negligence that the stevedores might have been guilty of, and imposed upon the shipowner a liability referable to its own default and not to anything that the stevedores did or failed to do. The petitioner has been held liable because it failed to perform its own independent obligation to remove the shelters when it left New York, and because it presented the shelters for use to the stevedores in Boston, with knowledge that the shelter involved was unsafe. Under that condition of the record the court had no choice but to direct a verdict in favor of the respondent on the cause of action for indemnity at common law. (*Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282; *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322; *Schwartz* v. *Merola Bros.*, 290 N. Y. 145.) One who has himself been guilty of affirmative, concurrent negligence is not entitled to indemnity. (*Washington Gas Co.* v. *Dist. of Columbia*, 161 U. S. 316; *Oceanic S. N. Co.* v. *Co. T. E.*, 134 N. Y. 461.) Nor is one who concurs in a wrong which results in damage entitled to indemnity. (*Sheffield* v. *Yaeger, et ano.*, 260 App. Div. 855, affd. 287 N. Y. 604; *Adler* v. *Tully & DiNapoli, Inc.*, 300 N. Y. 662.)

In *Adler* v. *Tully & DiNapoli, Inc., supra,* the opinion states:

> "The rule is well established that no recovery over will be allowed as between joint tort-feasors where the one seeking indemnity concurred in the wrong. The verdict of the jury established affirmatively the knowledge of [the general contractor] of the defective mechanism and the failure of said defendant having such knowledge to take proper precautions to prevent the accident."

Assuming in this case that the stevedores erected the shelter at New York, they had no reason to anticipate that it would remain on the ship until it reached Boston. By established custom the shelter would be removed by the ship's personnel. When the stevedores left the ship at New York, the shelter passed into the exclusive possession and control of the ship and it remained in possession and control of the ship until it was turned over to the stevedores at Boston. The ship's action in failing to remove the shelter, and in offering it to the stevedores for use with an implied representation that it was safe, constitutes independent, affirmative negligence which bars a right to indemnity.

In that connection it should be emphasized that there is no permissible inference from the evidence that the board which fell and struck the plaintiff was put on the shelter by the longshoremen. The inference that the longshoremen erected the shelters at New York is based entirely on circumstantial evidence. It is an inference drawn from the conceded custom that longshoremen build these shelters for protection against the weather. From the evidence that such a custom existed, it might be inferred that the longshoremen erected the shelter at New York. But the further inference that they placed on top of the shelter loose boards and tarpaulin is an inference based on an inference and is an exercise in pure speculation. It is well established law that, "Circumstantial evidence * * * consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist; but the process is fatally vicious, if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture." (*People* v. *Kennedy*, 32 N. Y. 141, 146; *People* v. *Fitzgerald*, 156 N. Y. 253.)

Further, the evidence in the case would seem to negative any such inference. The crew of the ship testified that the weather from New York to Boston was such that it would be impossible for the loose tarpaulin to remain

on top of the shelter; the shelter itself might withstand the weather, but not the loosely placed tarpaulin. The cargo on this ship was a cargo of lumber, and the inference that the pieces of lumber were thrown on top of the shelter during the voyage from New York to Boston to hold down the canvas, was at least as likely as the inference that they were placed upon the top of the shelter by the stevedores at New York. When the evidence is susceptible of two inferences, one of which imposes liability on the defendant and the other of which exonerates him, that which exonerates him from liability must be accepted. (*Digelormo* v. *Weil,* 260 N. Y. 192, 200; *White* v. *Lehigh Valley R. R. Co.,* 220 N. Y. 131, 135.)

The dissenting opinion in the Court of Appeals points out that, if it were assumed that the stevedore erected an unsafe shelter in New York, the mere fact that the ship was concurrently negligent in not removing it would not insulate the stevedore from liability to the injured party. The respondent has no quarrel with that statement. However, the rights of the injured workman and the right of the ship to indemnity stand on an entirely different basis. The injured third-party might well recover against the stevedore in such circumstances were it not for the provision of the Longshoremen's and Harbor Workers' Act; but the ship owner, being concurrently negligent, and a joint tort-feasor, would not be entitled to indemnity.

The respondent, however, cannot agree with the further statement in the dissenting opinion that the only negligence of which the ship was guilty was the negligence of "allowing Nacirema to use an unsafe shelter * * *". (R. 127) The ship did more than merely allow Nacirema to use an unsafe shelter. It offered the shelter to the stevedores for use in their work, thereby warranting its safe condition. In failing to tear down the shelter, the ship adopted the structure as its own and presented it to the longshoremen at Boston for their use. Under those circumstances

it was under a duty to make such inspections as were reasonable to insure that the structure was safe. (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Gucciardi* v. *Chisholm*, 145 F. 2d 514.) Assuming that the vessel and the stevedore were alike derelict in their duty of inspection, they were at most joint tort-feasors and neither was entitled to indemnity from the other for losses arising from a failure to inspect. (*Union Stock Yards Co.* v. *Chicago, D. & Q. R. Co.*, 196 U. S. 217, 228.)

In connection with the claim for common law indemnity, there is involved in this case a question which has so far not become material. The respondent, as employer of the injured workman, was liable for workmen's compensation under the Longshoremen's and Harbor Workers' Act. To allow indemnity at common law is to hold the employer liable in negligence for the workman's injuries. It would seem that the exclusionary provisions of the Longshoremen's and Harbor Workers' Act would be a sufficient defense to such a claim.

That problem has already been considered by this court but has not been decided. (*Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124.) In jurisdictions where indemnity at common law has been allowed against an insured employer, the basis of liability has been held to be an implied contract by the employer to indemnify the third-party for damages primarily resulting from the employer's active negligence. (*Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N. Y. 175.) It would seem to be just as logical to imply a contract on the part of one joint tort-feasor to contribute his proportionate share of a judgment resulting in part from his negligence. The theory in so far as it affects joint tort-feasors has been rejected by the Federal Courts. (*Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322.) There would seem to be no valid reason for adopting it in cases involving indemnity rather than contribution. (*Brown* v. *American-Hawaiian S. S. Co.*, 211 F. 2d 16.)

Liability imposed upon an insured employer for indemnity at common law is liability for damages "on account of" an injury to his employee. It is to do indirectly what the statute prevents being done directly. (*Johnson* v. *The United States, et al.*, 79 Fed. Supp. 448.)

However, since the verdict of the jury in this case establishes that the ship owner's liability was based upon its own affirmative negligence, independent of any negligence that might be ascribed to the stevedore, the question of the effect of the exclusionary clauses of the Longshoremen's and Harbor Workers' Act would still seem to be irrelevant.

POINT II

There was no breach by the respondent of its contractual obligation to do the stevedoring work properly and safely.

At the outset it should be emphasized again that, while the direct proof of custom furnishes a basis for an inference that the shelter was built by the stevedores at New York, it does not furnish a basis for the further inference that the shelter was erected negligently at New York. The lumber on top of the shelter was no part of the structure, and there is no evidence that it was customary to place lumber on top of shelters. The dilemma becomes apparent in the statement in the petitioner's brief, at page 14, that, "If the board was not placed on the shelter at Boston then it was placed there at New York * * *". But there is nothing at all to sustain an inference that the board was placed on the shelter at Boston, and no such issue was submitted to the jury by the court. The boards on top of the shelter might have been put there at New York or they might have been put there during the voyage from New York to Boston, and one inference is just as probable as the other. With the proof in that condition, the petitioner has obviously failed to establish an essential element of its case.

So far as the claimed breach of contract is concerned, there were two contracts involved here and the petitioner does not make it clear which contract he claims was breached. At New York, respondent contracted with the petitioner to discharge part of the cargo. The erection of shelters on the ship, if it entered into the contract at all, entered merely as an incidental consideration and not as a term or provision of the contract. As in all contracts, it must be assumed that both sides, in making the agreement, took into consideration the established customs of the harbor in so far as they affected the agreement. One of these customs was that stevedores, when loading and unloading ships, erect shelters for protection against the weather, and that the ship's crew removes those shelters before the ship leaves the harbor. The ship understood that the stevedores would erect shelters, and the stevedores understood that the ship would remove them. This involved reciprocal obligations. Neither party contemplated that the shelters would be left standing and certainly the stevedores could neither foresee nor anticipate any such procedure.

If the ship chose to allow these flimsy temporary structures to remain standing during the voyage from New York to Boston, subjected to the hazards of heavy weather, and furnished them to the stevedores for use in Boston, knowing, as the jury has found it did know, that the structure was defective, then the ship failed to live up to the terms of its contract and cannot look to the stevedore for indemnity. The respondent had a right to rely upon the ship's performing its part of the contract. As was pointed out in the majority opinion in the Court of Appeals, it could not reasonably have been foreseen that the ship would not perform its contract and remove the structure; and, even if it had been proven that the shelter was negligently constructed in New York, the stevedore could not be held liable for a breach of its contract because it could not have foreseen that the ship would have allowed the structure to remain standing and have offered

it to the workmen in Boston as a safe appliance for use in the unloading operation.

This court's decision in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, holds nothing to the contrary. In the *Ryan* case, *supra*, the stevedoring contractor was held liable because it had breached an essential term of its contract of safe stowage. This court held that the ship's failure to discover that breach of contract by the stevedore was not a defense to the claim for indemnity. The decision does not hold, as the petitioner here seems to contend it does, that, if the ship itself is guilty of a breach of the contract proximately resulting in damage, it is still entitled to indemnity.

The contract to unload at Boston made by the respondent with the petitioner was separate and distinct from the contract made at New York. At Boston, in connection with the stevedoring contract, the ship handed over to the stevedores the shelters, as appliances to be used in connection with their operations. No matter by whom the shelters had originally been erected, they had been taken over by the ship and had been in the ship's exclusive possession and control for several days before the ship docked at Boston. The ship could and should have demolished them; instead it adopted them as its own and furnished them to the stevedores for use. In doing that, the ship warranted that they were reasonably safe for the use to which they were going to be put, and the fact that the structure which was involved in this accident was unsafe constituted a breach of that warranty.

It is suggested that the failure of the stevedores to discover the defect before using the shelter constitutes a breach of its contract to perform its work safely and properly. But the law seems to be well settled that where an appliance is furnished by the ship for use by the stevedores, they may rely upon the ship's warranty of safety unless the condition of the appliance is such as to excite

suspicion or to suggest defects or danger. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Liverani* v. *Clark*, 231 N. Y. 178; *O'Dougherty* v. *Postal Telegraph Cable Co.*, 134 App. Div. 298.)

The proof here is that the shelter, on casual inspection, looked perfectly all right. It was about seven feet tall and the lumber which was on top of the shelter could not have been seen unless the stevedores had climbed up on some height to inspect it. Since there was nothing about the appearance of the shelter to excite their suspicion, the stevedores could reasonably rely upon the ship's warranty that the shelter was safe.

It is contended by petitioner that the ship's failure to remove the shelter did not constitute a breach of any duty owed by it to the stevedore. In this point of view the dissenting opinion seems to concur. It is difficult to understand that position. It was conceded here that the custom with respect to the erection and removal of shelters was a uniform, continuous, and well settled usage, known to the ship and to the stevedoring contractor. The parties must be presumed to have made their contract in reference to that custom. These shelters are flimy structures, erected for a purely temporary use, and not contemplated to remain after their temporary use has been served. To say that the ship owed no duty to the stevedoring contractor to remove them after they had served their purpose, is to say that the ship owner had it in its power to put the stevedoring contractor in a position where he might continue to be liable for the condition of a temporary structure which, if left standing, could well constitute a dangerous hazard, long after the structure had passed out of the control of the stevedoring contractor and after the stevedoring contractor was deprived of the opportunity to remove the structure or to make it safe. Quite obviously the custom as to the removal of these shelters was designed to protect the stevedoring contractor just as much as it was designed to protect the personnel of the ship. And

the ship owner's failure to remove the shelters constituted a breach of a duty owed by the ship owner to the stevedoring contractor, a duty which arose out of the stevedoring contract.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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No. 75

In the Supreme Court of the United States

OCTOBER TERM, 1957

WEYERHAEUSER STEAMSHIP COMPANY, PETITIONER

v.

NACIREMA OPERATING CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 75

WEYERHAEUSER STEAMSHIP COMPANY, PETITIONER

v.

NACIREMA OPERATING CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals for the Second Circuit (R. 118–127) is reported at 236 F. 2d 848.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1956 (R. 127–128). Motions for a rehearing and for rehearing *in banc* were denied on November 5, 1956 (R. 128–129). The petition for writ of certiorari was filed on February 2, 1957 and granted on March 11, 1957 (R. 129). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The respondent, a professional stevedore contractor, which had undertaken to unload a vessel owned by petitioner, its customer, permitted its employees to use a temporary, flimsily constructed, shelter located on the customer's vessel without previously inspecting it. A longshoreman, injured by a piece of lumber which fell from the shelter, recovered damages from the vessel and was paid.

The question presented is whether, by failing to inspect the shelter, the stevedore contractor breached its undertaking to its customer, the ship, to perform its task in a careful and prudent manner, and became liable to reimburse the customer for the damages resulting from the latter's payment to the longshoreman.

STATEMENT

On January 1, 1952, the *F. E. Weyerhaeuser*, a vessel owned and operated by petitioner (R. 5), left Longview, Washington, with a cargo of lumber for the ports of New York and Boston (R. 69). The vessel arrived in New York harbor on January 25, 1952 (R. 71). There, some of the lumber, especially the deck cargo, was unloaded (R. 72). The unloading operations at New York were performed by the respondent, Nacirema, as contracting stevedore for the petitioner (R. 72, 89). The vessel left New York harbor in the morning of January 30, 1952 (R. 72), and arrived at Boston the following day (R. 72), after a fairly stormy trip during which it was exposed

to winds up to 33 miles an hour[1] with small sea and swell to moderate sea and swell (R. 75–77).

At Boston, respondent Nacirema again contracted to furnish petitioner the required stevedoring services (R. 63–66). The weather in Boston was poor. It was rainy and windy (R. 44, 98–99).[2]

On February 4, 1952, *i. e.*, on the fifth day of the unloading operations at Boston, one Connolly, a longshoreman employed by the contracting stevedore, was struck and seriously injured by a falling piece of lumber (R. 119). An investigation indicated that the wood might have fallen from a temporary winch shelter. A loose tarpaulin on the top of that shelter was kept in place by two loose pieces of wood similar to the one which had struck Connolly (R. 34, 37, 41, 49–50).

Connolly instituted an action against petitioner setting forth two counts, one based on negligence, the other one on unseaworthiness of the vessel (R. 4–7). Petitioner filed a third-party complaint against the respondent stevedoring contractor, alleging that it had undertaken to stevedore the vessel properly for petitioner but had breached that contract, and praying that respondent be adjudged liable to reimburse petitioner for any damages the plaintiff Connolly might recover from it as a result of the breach (R. 10–13).

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[1] The vessel, moving at a speed of about 13½ miles an hour, headed into winds of about 20 miles per hour (R. 76).

[2] A longshoreman testified: "I remember that particular ship, it was one of the windiest ships, windiest days and rainy days." (R. 44.)

At the trial, the undisputed evidence showed that shelters of the type from which the piece of lumber allegedly had fallen serve to protect from the elements the longshoremen operating the winches (R. 27–28, 59). These shelters are built automatically by the longshoremen themselves when they board the vessel and are made of dunnage or scraps of lumber which are always lying on the deck (R. 38, 42, 55, 59, 92). They are invariably destroyed by the ship's crew as a requirement of good seamanship when the vessel is readied for leaving port (R. 59–61, 63, 72–73), because the winds on the high seas would blow apart these flimsily constructed shelters, thereby endangering the ship's crew and superstructures, and would otherwise interfere with the safe operation of the vessel (R. 59–61, 63).

The captain and the second officer of the *F. E. Weyerhaeuser* testified emphatically that the vessel arrived in Boston harbor without any deck shelters (R. 72–73, 81–82, 90–92, 95, 98), and that, in view of the hazards these shelters create for the crew, they would have been seriously derelict in their duties and subject to dismissal if they permitted their vessel to leave port (at New York) without first having removed those shelters (R. 72–73, 80, 95–96). Both officers pointed out that the loose tarpaulin and the loose pieces of wood could not have remained from New York to Boston, but would have blown or fallen off as the result of the strong wind and of the ship's motion (R. 76–78, 92; see *supra*, pp. 2–3).

Connolly's witnesses on the other hand testified just as positively to the contrary. The two winch operators stated that the shelter was on the deck of the *F. E. Weyerhaeuser* when she docked in Boston, and that they did not build the shelter themselves (R. 26–27, 39–41, 45, 46, 50). The gang foreman, a permanent employee of the contracting stevedore (cf. R. 66–67), testified to the same effect (R. 52–53, 55–56). He admitted that he did not inspect the shelter either before or after the accident (R. 55–56). The two winch men inspected the shelter only after the accident had occurred (R. 34, 49).[3]

The District Court first submitted Connolly's case against the vessel (*i. e.*, against petitioner) to the jury (R. 103). Under the instructions, the jury could render a verdict in favor of Connolly on the issue of negligence only if they found the shelter was on the *F. E. Weyerhaeuser* when it docked in Boston (R. 104).[4] The jury found in favor of the plaintiff Connolly on the negligence count, and against him on the issue of seaworthiness (R. 117). The District Court thereupon directed a verdict in favor of the third-party defendant, Nacirema, the contracting stevedore, which is the respondent here (R. 117).

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[3] Since the shelters could not have been erected before the deck cargo was removed in New York harbor (R. 70, 71, 88–89), they were necessarily erected by Nacirema's employees either in New York or in Boston.

[4] With respect to the issue of seaworthiness, the instructions were that Connolly could recover only if the jury found that the shelter was an appurtenance of the vessel (R. 105–106, 113–116).

Petitioner acquiesced in the verdict in favor of the injured longshoreman and that judgment has been paid and satisfied (R. 120). It appealed, however, from the dismissal of its third-party complaint against its stevedore contractor. A majority of the Court of Appeals affirmed (R. 118–127). The prevailing opinion (R. 118–124) held that it was established by the verdict that the winch shelter was on the deck of the *F. E. Weyerhaeuser* when it arrived in Boston harbor, that a board on top of it fell and injured Connolly, and that the vessel negligently failed to perform a duty owed by it to Connolly (R. 121). The ship, the opinion declared, owed the non-delegable duty to provide Connolly with a reasonably safe place to work (R. 121–122), and "[o]ffering a ready-made shelter to Connolly the ship could not shift its non-delegable responsibility for the unsafe condition thereof onto Connolly's employer," its contracting stevedore (R. 122). The majority distinguished the decision of this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, on the ground that, although the respondent stevedore contractor might have been negligent in the manner in which the shelter was constructed in New York harbor, it could not foresee that petitioner, its customer, would not remove the flimsy structure, but would instead offer it as a safe place to work to the Boston longshoremen which the contractor would employ there (R. 123–124).[5]

[5] The majority did not address itself to the question of whether respondent had violated any of its contractual duties in Boston.

Lumbard, J. dissented (R. 124–127). He took the position that with respect to petitioner, the customer, the stevedoring contractor had undertaken the primary responsibility for the safety of its employees and that the vessel's failure to remove the shelter was at most passive negligence which did not destroy the customer's right to be reimbursed by the contractor as the person primarily responsible (R. 126–127).

INTEREST OF THE UNITED STATES

The United States, as the world's largest shipowner, and therefore one of the largest customers of contracting stevedores, is concerned with the frequently-recurring question raised by this cause, *i. e.*, the circumstances in which a customer-ship, which has become liable to a longshoreman as a result of a dangerous condition brought about by its stevedore-contractor-employer's failure properly to perform its contract with the customer, may obtain reimbursement from the stevedoring company whose breach of contract actually caused the injury.

Two years ago, the United States appeared as *amicus curiae* in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, involving this issue. The Court then held that the customer-ship's right to reimbursement did not rest upon the tort concepts measuring the relative responsibility of the parties, such as primary and secondary, or active or passive tortious conduct,[6] but that it was of a contrac-

[6] The use of such concepts of joint tortfeasorship may well be precluded by the operation of Section 5 of the Longshoremen's and Harbor Worker's Compensation Act (33 U. S. C. 905).

tual nature based upon the stevedoring contractor's breach of its warranty of workmanlike service, which is not defeated by the fact that the customer vessel also might have failed to perform a duty owed to the longshoreman or to the ship's crew. Under *Ryan,* the test of liability is to be found in the reciprocal contractual duties between the stevedoring contractor and the customer vessel. The prevailing opinion below does not follow this contractual analysis, and while the dissent uses it to some extent, it utilizes terms such as primary and secondary responsibility and active and passive negligence, *i. e.,* concepts which were expressly rejected by this Court in the *Ryan* case. Three additional recent cases—*Hagans* v. *Farrell Lines,* 237 F. 2d 477 (C. A. 3);[7] *Amerocean S. S. Co.* v. *Copp,* 245 F. 2d 291 (C. A. 9); and *United States* v. *Harrison,* 245 F. 2d 911 (C. A. 3)[8]—indicate that other Courts of Appeals have had difficulties in applying the teachings of this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp, supra.*

In these circumstances, we believe it appropriate to file this brief in which we shall analyze, in the light of the *Ryan* decision, the nature of the customer ship's contractual right to reimbursement, and the scope of the stevedoring contractor's warranty of the skill of its trade.

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[7] Chief Judge Biggs and Maris, *J.* dissented from the denial of a motion for a rehearing *in banc*, pointing out that the decision unduly narrowed the scope of *Ryan.*

[8] Healy, *J.* filed a vigorous dissent relying on *Ryan.*

SUMMARY OF ARGUMENT

The factual and legal, if not the procedural, problems raised by this cause are similar to the ones decided by this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124. A longshoreman in Boston was injured while unloading the vessel of his employer's customer, presumably by a piece of lumber which had fallen from a winch shelter. The longshoreman sued the ship on the grounds (*a*) that its officers had been negligent in failing to remove the shelter before leaving the prior port (New York), and (*b*) that the defective shelter had made the vessel unseaworthy. The jury rendered a verdict in favor of the longshoreman on the negligence count alone.

In the present proceedings, petitioner, the customer, seeks to be reimbursed by its stevedore for the liability of the ship incurred to the longshoreman as a result of the stevedore's breach of contract. The District Court directed a verdict in favor of the stevedore contractor, and the Court of Appeals affirmed. In this posture of the case, petitioner is entitled to a reversal, unless it appears that it cannot succeed even if the facts on the record are construed most favorably to it.

A

Respondent's contract to perform stevedoring services for its customer, the petitioner, carried with it the implied promise to perform those services with due professional care and skill; in other words, respondent warranted the skill of its trade of contracting stevedore. This warranty is the very essence of the agree-

ment to stevedore petitioner's vessel. The promisor under such a contract (whether common law or maritime) to perform professional services is liable for damages caused by sub-standard performance.

Under its contract, respondent had assumed the obligation to its customer, petitioner, to load, stow, and unload the cargo carefully and safely. This contractual obligation, which includes the duty not to let its longshoremen operate under dangerous conditions, was breached when respondent (in Boston) failed to tear down the flimsy winch shelter and permitted its longshoremen to work in it for five days without any inspection.

B

In the case of a breach of contract, recovery is measured by the damages foreseeably resulting from a breach. Where liability to a third party is among the foreseeable damages, the promisee is entitled to be reimbursed for this liability, even in the absence from the contract of an express indemnity agreement.

Here, petitioner has been subjected to liability to the injured longshoreman as the result of respondent's breach of its contractual duty owed to petitioner to perform the unloading operations carefully and skillfully. This consequence of liability was foreseeable; accordingly, petitioner's payment to the longshoreman constitutes the measure of damages for respondent's breach of contract.

C

Petitioner's asserted failure to remove the winch shelter (in New York) does not defeat its right of

recovery against its contractor. Since the remedy of reimbursement is purely contractual in nature, it is not affected by concepts such as active and passive, or primary and secondary, negligence—principles designed to allocate and distribute tort liability among tortfeasors. The only question here is whether the customer's failure to remove the shelter constituted the breach of a contractual duty owed to respondent, its contracting stevedore. This it was not, because the customer's right to rely on the zealous performance and superior experience of a professional stevedore contractor is the very purpose for which such a specialist is hired.

Thus, while the stevedoring contractor owes the customer ship the duty to use proper care in the loading or unloading process, the ship does not owe the contractor a reciprocal duty. It need not tell the professional stevedoring contractor anything which the latter would know or find out if it knew its business. Any competent stevedoring contractor knows that a shelter which had been erected and used by the stevedore contractor in another port, and had withstood the journey from New York to Boston in mid-winter, is bound to be in a weakened and dangerous condition and a hazard for the longshoremen. Petitioner, the customer, did not owe respondent, the professional, the obligation of removing the obvious danger or of warning it of this plain danger.

ARGUMENT

Petitioner, the shipowner, seeks review of a decision of the Court of Appeals which upheld the grant of a

directed verdict dismissing petitioner's third-party complaint against its stevedore for breach of contract. In this posture, petitioner is entitled to a reversal unless it appears that it cannot succeed, even if the evidence were construed by the jury most favorably to it, giving it the benefit of every legitimate inference. *Hickman* v. *Jones,* 9 Wall. 197, 201; *Chambers* v. *Tobin,* 204 F. 2d 732, 733 (C. A. D. C.); *Lindeman* v. *Textron, Incorporated,* 229 F. 2d 273, 274 (C. A. 2).

The substantive issue raised is the same as was presented to this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.,* 350 U. S. 124, *viz,* whether a customer ship, which has been held liable to a longshoreman for injuries suffered in an accident caused by a contracting stevedore's breach of its professional duty to perform all parts of its loading and unloading operations in a safe workmanlike manner, is entitled to be reimbursed for the judgment which it had to pay to the injured longshoreman. In *Ryan,* the Court answered this question in the affirmative. It held that, where such a stevedoring contractor breaches its warranty to perform its contract with its customer ship competently and safely (350 U. S. at 133), it becomes obligated to discharge the customer of all foreseeable damages, which includes the liability of the vessel to third persons (350 U. S. at 129, fn. 3). And this liability of the stevedoring contractor, based upon the breach of the contractual duties owed by it to the customer, is not defeated by the circumstance that the latter may have been derelict in duties it owed to the injured longshoreman

and which it employed the stevedore contractor to perform (350 U. S. at 134–135).

We submit that it appears plainly from the record that respondent did not perform its contract duty to petitioner with professional care and skill when it permitted its winchmen in Boston to use the flimsy shelters on board the *F. E. Weyerhaeuser* for five days without even inspecting them; that it was a foreseeable consequence of this breach of contract that the petitioner would become liable to a longshoreman; and that the vessel did not violate any duty owed by it to its stevedore contractor when it failed to remove the shelters in New York.[9] A jury thus could easily have found in favor of the petitioner-customer, and it was error to direct a verdict against the customer and in favor of the contractor.

A. BY FAILING TO INSPECT THE SHELTER, RESPONDENT BREACHED THE WARRANTY OF WORKMANLIKE SERVICE OWED BY IT TO PETITIONER

1. *A contract to perform services includes the implied warranty of workmanlike services.* An agreement to perform services carries with it the implied undertaking that the promisor will carry out his task with due care and ordinary skill. In other words, the obligor warrants the skill of his trade, *spondet*

[9] In view of the jury verdict (*supra*, p. 5), we must, of course, base our argument on the assumption that the shelters were on the deck of the *F. E. Weyerhaeuser* when it docked in Boston.

peritiam artis.[10] As this Court pointed out in *Ryan*, this warranty to the customer is of the very essence of the contract for professional services (350 U. S. at 133). The obligor "must answer for the damage if the quality of the service is lower than the standard." *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253, 257.

This rule that a contract to perform services implies the promise to perform the work competently and safely is not limited to the common law.[11] *Southport Transit Company* v. *Avondale Marine Ways*, 234 F. 2d 947, 951 (C. A. 5), points out that the decision of this Court in *Ryan* merely restates "a time-honored traditional maritime cause of action for failure prudently to perform."[12] Cf. *The Severance*, 152 F. 2d 916, 920 (C. A. 4); *H. & C. Grayson* v. *Ellerman Line* [1920] A. C. 466, 472, 474 (H. of L.).

2. *Respondent breached its contractual duty owed to petitioner to load the vessel safely and properly.* Under the foregoing general principle, a stevedoring contractor, such as respondent, which holds itself out to prospective customers as an experienced technician engaged in the business of loading, stowing and un-

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[10] Kent, *Commentaries* (12th ed.), Vol. 2, p. 589; Story, *On Bailments* (8th ed.), Section 431; *Isham* v. *Post*, 141 N. Y. 100, 105–106; *Gill* v. *Middleton*, 105 Mass. 477, 479; *Adams* v. *Factory Mutual Liability Co.*, 298 Mass. 141, 143.

[11] The discussions of the rule by Kent and Story, *supra*, fn. 10, hint that it may have been imported from the civil law, the cradle of admiralty.

[12] The stevedoring contract is a maritime contract. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 61–62; *American Stevedores* v. *Porello*, 330 U. S. 446, 456.

loading cargo, has the duty to perform this task carefully and safely. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133; *The Evelyn*, 282 Fed. 250, 252 (C. A. 2); *Cornee* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621; *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791 (C. A. 2). This duty which, as this Court showed, is of the very essence of the stevedoring contract (*supra*, pp. 12–13), is breached where the stevedoring contractor permits its longshoremen to work the customer's vessel under conditions which are dangerous, either to its own knowledge or according to the professional standards of a competent stevedore. *United States* v. *Arrow Stevedoring Company*, 175 F. 2d 329, 331 (C. A. 9), certiorari denied, 338 U. S. 904; *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181, 182 (C. A. 9); *American President Lines* v. *Marine Terminals Corporation*, 234 F. 2d 753, 758 (C. A. 9), certiorari denied, 352 U. S. 926.

Respondent violated this contractual obligation when it permitted its winchmen to occupy the shelter without even inspecting it. The testimony and the decision below clearly establish that these shelters are flimsily built, likely to be blown apart on the high seas (*supra*, pp. 3, 4). If they survived the ocean journey at all, it was certain that their structure had been seriously weakened. The failure to tear down the shelters, and their use for days at Boston without any inspection, thus came close to recklessness.[13] In-

[13] *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 333, 334 (C. A. 9).

Boston Woven Hose, etc., Co. v. *Kendall,* 178 Mass. 232, 59 N. E. 657 (1901),[19] held that where the customer of a boilermaker had become liable to third persons as the result of an explosion of the boiler, he was entitled to be reimbursed by the boilermaker as damages for breach of warranty. And *Dunn* v. *Uvalde Asphalt Paving Co.,* 175 N. Y. 214, 217, 67 N. E. 439 (1903), decided that where a prime-contractor had become liable to third persons as the result of the negligent performance of a contract by a subcontractor, the latter was liable to reimburse the former, as its customer, even in the absence of an express indemnity agreement. *Schubert* v. *Schubert Wagon Co.,* 249 N. Y. 253, 257, established the rule generally that reimbursement is based upon the breach of the duty to perform faithfully, that it is the compensation for having furnished substandard services to the customer.

In sum, it has become generally recognized that reimbursement is the proper measure of damages where a breach of contract foreseeably subjects the customer to a liability toward third persons. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.,* 350 U. S. 124, 129, fn. 3, 130–131, 132–133. And see *McFall* v. *Compagnie Maritime Belge,* 304 N. Y. 314, 330; *Wright* v. *Wright,* 229 N. C. 503, 508–509; *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.,* 10 F.

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remote and the stevedoring company was entitled to be reimbursed for the sum paid to its employee, and was not limited to nominal damages.

[19] Quoted with approval in *Union Stock Yards Co.* v. *Chicago, etc., R. R. Co.,* 196 U. S. 217, 226–227 (1905).

2d 769 (C. A. 2);[20] *Maryland Cas Co.* v. *Employers Mut. Liab. Ins. Co.*, 208 F. 2d 731, 733 (C. A. 2); *United States* v. *Savage Truck Line*, 209 F. 2d 442, 447 (C. A. 4), certiorari denied, 347 U. S. 952; *Restatement of the Law of Contracts*, Section 334;[21] Williston, *Contracts* (Rev. ed., 1937), Section 1394; Williston, *Sales* (Rev. ed., 1948), Section 614 (a); *Restatement of the Law of Restitution*, Part I, Chapter 3, Topic 3, Introductory Note, pp. 328–329, Sections 93–96; *Restatement of the Law of Agency*, Section 401 (*c*).

2. As we have shown (*supra*, pp. 14–16), respondent breached its contractual duty to perform its customer's unloading operation with professional skill when it permitted its winch operators to use the flimsy shelter without even inspecting it. As could easily be foreseen, a longshoreman, Connolly, was injured as the result of this breach and petitioner, the customer, became liable to Connolly because it had violated (as a result of respondent's breach of contract) the non-delegable duty owed by it to Connolly to provide him with a safe place to work. Petitioner, consequently, is entitled to be reimbursed by respondent for the damages petitioner had to pay Connolly.[22]

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[20] Cf. Seavey & Scott's Notes on the *Restatement of the Law of Restitution*, p. 150.

[21] Section 334, Illustration 5, is a paraphrase of *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640 (C. A.).

[22] Cf. the epitomization of the *Ryan* decision by Learned Hand, J., in *Grillea* v. *United States*, 232 F. 2d 919, 924 (C. A. 2): "the injuries to the employee measure the damages for the breach."

C. PETITIONER'S FAILURE TO REMOVE THE WINCH SHELTER DOES NOT DEFEAT ITS RIGHT TO REIMBURSEMENT

1. *Since the contractor's liability to the customer is of a purely contractual nature, it can be defeated only if the customer had breached a contractual duty owed by it to the contractor.* We have shown in the preceding portions of this brief that respondent's liability as a professional stevedore contractor to reimburse its customer, petitioner, is of a purely contractual nature. Consequently, the only defenses open to respondent are those which excuse a breach of its contract. This Court has exploded the notion that the concepts of active and passive, or primary and secondary, tortious conduct or negligence, developed in the law of quasi-contractual or tort indemnity,[23] have any validity in this area of contract. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 at 133, 134.[24] The sole issue therefore is whether the petitioner's failure to remove the shelter in New York constituted a breach of a duty owed by petitioner, the customer, to respondent, the professional contractor which it employed.

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[23] *Supra*, pp. 7, 17, fns. 6, 16.

[24] See *Seawright* v. *A. Garcia y Cia, Ltda.*, 138 F. Supp. 881, 883 (E. D. Pa.). Similarly, since petitioner does not seek contribution from a joint tortfeasor, the considerations underlying *Halcyon Lines* v. *Haenn Ship. Corp.*, 342 U. S. 282, are inapplicable. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133; *American President Lines* v. *Marine Terminals Corp.*, 234 F. 2d 753, 760 (C. A. 9), certiorari denied, 352 U. S. 926; *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 793 (C. A. 3).

The verdict of the jury has established that, by failing to remove the winch shelter, petitioner had breached the non-delegable duty owner by it *to Connolly*, the longshoreman, to provide him with a safe place to work. It does not follow, automatically, that this breach of a non-delegable duty *to Connolly* equally constituted the breach of a duty owed by petitioner *to respondent*, the professional hired to perform that non-delegable duty.[25] To the contrary, it is the very purpose of having work performed by a specialist to be able to rely on his warranty of superior knowledge and experience. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 134–135; *Boston Woven Hose, etc., Co.* v. *Kendall*, 178 Mass 232, 237; *H. & C. Grayson* v. *Ellerman Line*, [1920] A. C. 466, 472, 474 (H. of L.). For this reason, it is generally recognized that the customer's failure to inspect, or to discover a dangerous condition, or even to remove one which the contractor could discover if he used the usual skill of his occupation, does not normally defeat the customer's right to be reimbursed by an expert contractor.[26]

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[25] Cf. *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640, 644.

[26] *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*, 10 F. 2d 769, 772 (C. A. 9); *Seaboard Stevedoring Co.* v. *Sagadahoc S. S. Corp.*, 32 F. 2d 886 (C. A. 9); *Derry Electric Co.* v. *New England Telephone & Telegraph Co.*, 31 F. 2d 51, 52 (C. A. 1); *Manning Mfg. Co.* v. *Hartol Products Corp.*, 99 F. 2d 813, 814 (C. A. 2); *General Accident, etc.* v. *Goodyear Tire & Rubber Co.*, 132 F. 2d 122, 125 (C. A. 2); *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902, 907 (C. A. 9); *Restatement of the Law of Restitution*, Secs. 93, 95, comment a, par. 2; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81

2. *The vessel did not violate a contractual duty owed by it to the stevedoring contractor in failing to remove the winch shelter.* Petitioner's failure to remove the shelter upon leaving New York harbor violated, as we have noted, duties of due care owed to its crew and to the longshoremen working on the vessel in Boston harbor. It did not constitute, however, the violation of a duty owed to the respondent which it employed as its professional stevedoring contractor. A competent stevedore would have realized that the shelter was in a weakened condition after it had been used in New York harbor for several days and remained on the deck of the vessel during the trip from New York to Boston during the winter months. Proper stevedoring practices therefore required the removal of the shelter, or at least its inspection, and that was the professional duty owed by respondent to petitioner (*supra*, pp. 15–16, 19–21).

Petitioner, the customer, on the other hand, did not owe to respondent, the contractor, any corresponding duty to remove the shelter, or to warn the stevedoring contractor of obvious danger. In the words of Learned Hand, J., the ship is under no duty to tell the stevedore anything he would know if he knew his business.

U. of Pa. Law Rev. 130, 156–158; Note: *Contribution and Indemnity Between Joint Tort Feasors*, 45 Harv. Law Rev. 349, 351–352.

The element of the right to rely on the expertise of the specialist contractor distinguishes cases such as *Union Stock Yards Co.* v. *Chicago, etc., R. R. Co.*, 196 U. S. 217, 228, in which reimbursement was denied on the ground that "the negligence of the parties has been of the same character." We submit that, according to the analysis of this Court in *Ryan*, the parties here were not *in pari delicto* but *in pari peritia* (cf. *supra*, pp. 7–8, 12–13, 13–14.)

Hastorf Contracting Co. v. Ocean Transportation Corp., 4 F. 2d 583 (S. D. N. Y.), affirmed, 4 F. 2d 584 (C. A. 2). Similarly, it has been held in *Cornee* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621, "The stevedoring company owes to the vessel and her owners the duty of using due care in the loading; but the vessel and her owners owe no such duty to the stevedoring company."

Thus, the stevedoring contractor owes to its customer the duty to stop the loading or unloading operation on its own initiative as soon as it realizes that it is unsafe to proceed. *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329, 331 (C. A. 9), certiorari denied, 338 U. S. 904; *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791, 793 (C. A. 2); *The Robert R.*, 255 Fed. 37, 39 (C. A. 2); *The Adah*, 258 Fed. 377, 380 (C. A. 2). Moreover, since the stevedoring contractor is in charge of the operation "and the master had no duty or right of supervision as to instrumentalities adopted and methods used,"[25] the contractor even owes the duty to the customer to disregard improper instructions given by the ship's officers. It has either to disregard such orders or to stop working until the dangerous condition has been remedied. *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791 (C. A. 2); *Smith* v.

[25] *Cornee* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621; *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177, 179–180 (C. A. 2), certiorari denied, 346 U. S. 897; *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397, 401 (C. A. 2). See the testimony at R. 85, 109, that the stevedoring operations are independent of the ship's officers' duties and that their sole responsibility with respect to the unloading operations here involved was to see that the cargo was not dropped overboard.

Nicholson Transit Co., 39 F. Supp. 795 (W. D. N. Y.).[28]

For these reasons the circumstance that petitioner had not removed the shelter in New York did not justify its use by respondent in Boston. The situation is identical with the frequent occurrence that the stevedoring contractor uses defective material furnished to it by the vessel. If the defect is evident or could have been discovered upon such inspection as the expert stevedoring contractor was obliged to make, the customer's right to reimbursement is not defeated by the fact that the ship itself had furnished the equipment. *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (C. A. 9), certiorari denied, 338 F. 2d 904; *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. A. 9).[29]

A recent re-examination of this problem in the light of the *Ryan* decision may be found in *American President Lines* v. *Marine Terminals Corp.*, 234 F. 2d 753 (C. A. 9), certiorari denied, 352 U. S. 926. There, a longshoreman had been injured by a defective strong-

[28] Indeed, where the vessel refused to cooperate with the stevedoring company, it was the latter's duty to be "energetic" in attempting to remedy the situation. *Metcalfe* v. *Chiarello*, 294 Fed. 29, 30 (C. A. 2).

[29] Where the defect in the equipment is hidden and unknown to the stevedoring company and could not have been detected had it used the care required in the circumstances, it is of course not liable for reimbursement because no duty to the ship has been breached. *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, 323 (C. A. 2); *Gill* v. *United States*, 184 F. 2d 49 (C. A. 2); *Mikkelson* v. *S. S. Granville*, 191 F. 2d 858, rehearing denied, 192 F. 2d 809 (C. A. 2), cf. the district court decision, 101 F. Supp. 566, at 568–569 (E. D. N. Y.).

back, a part of the vessel's equipment. The stevedoring contractor had been advised of this defect. The court held that the vessel was entitled to reimbursement, because (234 F. 2d at 758):

> When the shipowner through its ship's officer informed Marine that some of its beams were defective and requested that all excess beams be removed, Marine, knowing that Number 2 Strongbeam had no lock, was under a specific duty to remove that beam. By failing to remove the beam and by continuing with the work under these hazardous conditions known to it, Marine breached its implied contractual duty to do its work in a safe and workmanlike manner.

and again (234 F. 2d at 759):

> Here, Marine was charged with notice before the accident from the ship's officer that some strongbacks were defective * * *. It would have taken little time to remove the lockless beam * * *. Marine [the stevedoring company] was in full control of the work and was in charge of this very situation. After Marine was notified of the defective beams by the shipowner, the shipowner did nothing to increase the hazard or to cause the breach of contract by Marine. Marine openly and plainly breached its obligation to perform its work in a safe manner. We think it is no defense to that breach that American [the ship] supplied the defective beam.

These considerations are fully applicable here. As an experienced professional stevedoring contractor, respondent was put on notice that the winch shelter

was in an unsafe condition. Removal, or at least inspection, would have been a simple thing. Five days later, the accident occurred. Petitioner had done nothing to increase the hazard once respondent had assumed full control in Boston, begun the stevedoring operation, and carried on for five days. The circumstance that petitioner had earlier failed to remove the shelter thus does not constitute a defense to its claim for reimbursement.

CONCLUSION

The District Court erred in directing a verdict in favor of the respondent stevedoring contractor and against its customer, petitioner. Indeed, we believe that petitioner's motion for a directed verdict (cf. Pet. Brief, p. 3) should have been granted. It is therefore respectfully submitted that the decision of the Court of Appeals should be reversed.

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